

DELAWARE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of	)	
	)	
("Student")	)	ORDER
Petitioner,	)	Trial Dates: 1/30/13, 2/4/13, 2/14/13, 3/6/13
v	)	Date of Order: 4/8/2013
CHRISTINA SCHOOL	)	DE DP 13-6
DISTRICT ("District")	)	

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DE 19801  
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**DECISION AND ORDER**

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## **I. PROCEDURAL BACKGROUND**

Mother and Father on behalf of Student filed this Due Process Complaint on November 30, 2012 alleging that Christina School District had denied Student then six (6) years of age a Free and Appropriate Education (“FAPE”) in:

- a. Failing to adequately and timely evaluate Student on all areas of suspected disability;
- b. Failure to provide an appropriate Individualized Educational Plan that
  1. had appropriate and sufficient goals in all relevant areas;
  2. sufficient special education and related services given Student’s language behavioral and motor/coordination deficiencies;
  3. specially designed and modified instruction adequate for Student;
  4. adequate supports and related services including speech/language, social and adaptive skills;
  5. an adequate Behavior Support Plan for Student;
  6. adequate measures of student’s progress; and
  7. appropriate assistive technology.
- c. Failure to provide Student an education that allowed him to make meaningful educational progress;
- d. Violated the Parent’s procedural rights including the failure to provide procedural safeguards.

As a result Parents requested the following relief:

- a. reimbursement for costs of Student’s attendance at Private School;
- b. reimbursement of costs of evaluation, summer services for Student and all related expert costs;
- c. compensatory education in the form of an education fund sufficient to compensate Student his losses for District’s failure to provide FAPE;
- d. legible copies of Student’s educational records;
- e. declaratory relief that Student’s rights have been violated under the IDEA/IDEIA and Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. Sec. 12131 *et. seq.*;
- f. reservation of the right to seek damages, attorney’s fees and costs

Originally, the first date of hearing was scheduled for January 28, 2013, but this continued at Parents’/Student’s counsel justifiable request due to unexpected illness. Four days of hearing were held on January 30, 2013, February 4, 2013, and February 14, 2013 and March 6, 2013 the first day practicable when all counsel and panel were available. The parties requested to brief closings, which was granted. Parents’/ Student submitted over 536 pages worth of documents and District submitted over 332 pages. Counsel elected to do written closings which were submitted electronically by both counsel and first received by email due to the lateness of their email March 21, 2013. Lastly, as I became clear that one of the panel members wanted to issue a separate dissent, an extension to issues this opinion was granted to April 8, 2013 to ensure that all panel members’ views are fully considered prior to issuance of this opinion. Good cause exists to extend the timelines for these

submissions due to amount of evidence in these proceedings and disruptions of a personal nature with panel members. The panel has met and considered all of the above materials, discussed and debated them and this is the decision after consideration of them all. As will be clear this is a majority decision and to give any appeals tribunal, the maximum exposure a detailed summarization of the Testimony and Exhibits is provided.

## **II. TESTIMONY AND EXHIBITS**

As a preliminary matter, as a consequence of due to the unexpected illness and continuance of the first date of hearing 1/28/13, was that Counsel to minimize the disruption agreed to proceed out of turn with witnesses so that a previously scheduled expert witness by Parent's counsel, Dr. K. would go on as scheduled. This was a well reasoned agreement. To limit the confusion that this may create while providing a chronological order of the testimony, inside the parentheses besides the title naming the witness, it indicates which party called the witness.

### **A. DISTRICT TEACHER (District's 1st witness)**

1. District Teacher was Student's Kindergarten Teacher for the September, 2011- June, 2012 School Year and had been the teacher for this specialized support kindergarten classroom at the Elementary School for three (3) years.
2. District Teacher has a Master's In General Education, a Master's in School Leadership with a concentration in Special Education and an additional 20 credit hours education in Special Education. N.T. 1/30/13 at 26-28.
3. The Specialized Kindergarten Classroom where Student was placed at Elementary School in 2011-2012 (and at the center of the issues) had Seven (7) Pupils including Student and a full time paraprofessional to assist the teacher and all Pupils. The purpose of this lower ratio was to provide a slower pace of education and to work on each pupil's Individualized Education Plan (hereinafter "IEP") goals. N.T. 1/30/13 at 31-32. Either District Teacher and/or the paraprofessional were with the Student at all times and typically, both were present.
4. In comparison with the other peers in this 2011-2012 class, Student's IEP goals were about in the middle. District Teacher described Student's behavior as not the most challenging in comparison to other pupils. N.T. 1/30/13 at 32.
5. The typical days for Student in District Teacher's class:
  - a. Started with a "Morning Meeting", where pupils civilly addressed one another. The children are told what they are doing that day, such as what specials they had (art, music etc....), and are assigned a particular role termed a job chart (leader etc...) in the job chart. N.T. 1/30/13 at 35.
  - b. Next, the pupils had an approximately ninety minute "Reading Block". At this Reading Block, two reading programs were used for Student; the roughly first half was devoted to the District's generalized education curriculum for all kindergartners known as

the “Journey’s”. There is one book per week, they read it with frequent stops to discuss setting, the chronology of story, illustrations etc... and then the pupils are provided 2 sight words a week and worksheets modified to Student’s level and then they do a hands on kinesthetic activity related to the Journey’s curriculum. N.T. 1/30/13 at 35-40. The worksheets were modified to Student’s ability. For example, at the beginning of the week, the sight words were printed with dotted lines and District Teacher traced the sight word with Student and then as the week progressed, the worksheet would become more difficult, but repeat the same sight word. N.T. 1/30/13 at 57. Similarly, mnemonics were employed to assist Student with letter identification, letter articulation and letter formation. N.T. 1/30/13 at 58-61. After the Journey’s curriculum which was about 45 minutes, the second part of the “Reading Block” started where the Student was provided direct instruction under the “Reading Mastery “ program, a 45 minute intervention program, scripted and geared towards the pupils in District Teacher’s Classroom (including Student). N.T. 1/30/13 at 35-40. Reading Mastery was a research based program. N.T. 1/30/13 at 64. District Teacher and the paraprofessional were certified to teach “Reading Mastery”. N.T. 1/30/13 at 65.

- c. After Reading, the pupils including Student went to fun centers where they engaged in play/socialization activities. N.T. 1/30/13 at 42.
- d. Then the pupils including Student went to their Specials (N.T. 1/30/13 at 42.) such as Art, Music, library and music where they were with Student’s without IEPs from the General Education Program. N.T. 1/30/13 at 34.
- e. Then the pupils including Student did the Math portion of their instruction which was called “Calendar” which included math instruction counting, days of the week, month instruction, weather tracking (using graphs so the children were exposed to concepts of comparison such as more than/ less than). Letter sounds were also addressed in Calendar. N.T. 1/30/13 at 42-43.
- f. Then the pupils including Student are instructed in the “Touch Math” program, an intervention program that uses more than one child’s five senses (visual, touch (manipulatives), movement.) N.T. 1/30/13 at 42-48.
- g. Then the pupils including Student went to Lunch and Recess. Student and his classmates were integrated with Children without IEPs. N.T. 1/30/13 at 48.

- h. After recess to help Student and classmates relax and settle down there was a read aloud story and then Student and his classmates were exposed to a modified version of the District's science and social studies curriculum with the modifications and accommodations done to allow benefit to Student. N.T. 1/30/13 at 50.
  - i. Writing instruction was done though out the day using parts of the "Handwriting without Tears" program used generally in District and was modified for Student. N.T. 1/30/13 at 50-54. For Student, a slant board and different usage of various sorts of pencil grips were worked on in conjunction with an Occupational Therapist. N.T. 1/30/13 at 55.
  - j. As to articulation and phonological awareness, District Teacher worked in conjunction with Student's speech pathologist who came to the classroom at least once a week during Calendar time and additionally, once a week did group speech therapy which included Student. N.T. 1/30/13 at 69-71.
  - k. Analogously often the Occupational Therapist would come to the classroom when craft making was done with Student. N.T. 1/30/13 at 71. Additionally, the game playing that was done such as feeding the animal was often done with Student using tweezers to assist Student with fine motor deficits. N.T. 1/30/13 at 72.
  - l. As to Computers, touch screens were used as a part of Assistive Technology, rather than a "mouse". N.T. 1/30/13 at 74.
  - m. District Teacher also utilized positive reinforcement by giving rewards for positive behavior to Student (N.T. 1/30/13 at 77-79) and "model" where the teacher/ staff would act out what was appropriate behavior and then have the pupils practice it. To assist the Student with transitioning to different activities, a visual schedule was used. That is Student did not just hear about the transition, he saw it. Also, clearly defined behavior expectations for Student were defined for him in the different educational settings Student went to such as cafeteria, playground classroom. N.T. 1/30/13 at 74.
6. At the beginning of the School Year, the District was following Student's IEP from Elementary School that was done the previous School Year and attached as District's Exhibit 28. The mutual decision of District and Parent was made to work on this IEP as Parents indicated they had new information a psychological evaluation for Student. This led to an IEP meeting on November 2, 2012, where the Student's new information, a psychological evaluation done on Student

at A.I. DuPont, was considered as well as all services Student was receiving under the IEP. N.T. 1/30/13 at 85-88. In comparing the recommendations in the Student's psychological report as District's Exhibit 14 with the services actually being provided at Student's kindergarten class at in 2011-2012 at school, District Teacher testified that all were being followed except that regarding homework as homework was not given at Elementary School to Student. N.T. 1/30/13 at 89-90.

7. Student also had a behavioral plan originally done at Student's Prior Elementary School and followed at this Elementary School during the 2011-2012 school year and not modified. District Exhibit 1. (hereinafter "Behavioral Plan"), As to the Behavioral Plan, District Teacher testified that the antecedent modifications were to provide Student with a highly reinforcing and motivating environment translated by District Teacher as praise for good behavior, consistent routines, making the Student's schedule visually accessible to Student, clear short instructions, close proximity to Student during snack times, alternative behaviors taught to Student via teacher modeling, role playing exercises, stories in books such as "My Voice is a Volcano" targeted to decrease yelling. N.T. 1/30/13 at 93-96.
8. District Teacher testified that Student's behavior was not so atypical from that of the other pupils in her class (or Kindergartners without an IEP) as to alarm her. Student did not exhibit tantrums to her, but did use name calling, pushing hitting other pupils but "nothing that was too outrageous." N.T. 1/30/13 at 97-98 apparently comparing Student's behavior to the typical immature kindergartner. N.T. 1/30/13 at 97. Student was made to talk about the behavior and appropriate alternatives to the misbehavior were discussed. As to the length of Student's misbehavior, District Teacher indicated they were "a two minute blurb or a 30 second thing." N.T. 1/30/13 at 242.
9. As Parents wanted a daily log kept of Student's misbehaviors, District Teacher did so reporting to Parents the sort of misbehaviors for Student that she would not have reported for a typical kindergartner without an IEP explaining the reason the slight tap/hit/push of a pupil would not necessarily be reported to a Parent was those sort of misbehaviors typical to all kindergartners learning to socialize. N.T. 1/30/13 at 100-101. She went on to qualify that just because a pupil misbehaved for 15 seconds did not mean the Student did not have a great day. However, as requested by parent, in the case of Student, she reported them. N.T. 1/30/13 at 102. This was done to assist the Parents and Student especially since Student had a behavioral therapist outside of the school district. N.T. 1/30/13 at 325-326.
10. As to hitting of staff, District Teacher testified that during the year there was only one minor incident where Student barely touched her (in

the beginning of the school year) and after that, Student never hit her or offensively touched any staff. N.T. 1/30/13 at 104-105.

11. District Teacher testified that Student did not exhibit “tantrum behavior” defined in the Behavioral Plan as including, but not limited to, dropping his entire body to the ground, yelling, waving and swinging his arms” to her. Going on to explain, that while at times Student might yell and upon teacher direction might exhibit a firm no, but did not throw a tantrum and when Student displayed this firm no, the teacher would talk, calm the Student down and get Student to the activity so as not to reward the bad behavior . N.T. 1/30/13 at 109-110.
12. As to name calling a behavior that the Student’s Behavioral Plan sought to decrease Student displayed this with other pupils, but not staff. Student did hit other Pupils and spit at them a few times, such as making a noise whose slang is called a “raspberry”, but not collecting and projecting saliva towards another Pupil. N.T. 1/30/13 at 112, 114, 1006.
13. As to addressing Student’s issue with transitioning and being overly rigid when encountering change, District Teacher testified this was not that much of an issue for Student (although warnings such as turning on and off lights and a reminder that a transition was to occur briefly before a transition was done). While Student sometime wanted to finish a task, as long as you told Student something such as you have 5 minutes to finish the task, the transition proceeded. As to early dismissal, Student was dismissed 5 minutes early so as not to have to encounter the mass of other children being dismissed. N.T. 1/30/13 at 117.
14. District Teacher testified that she was out 8 to 9 days in December and in June, 2012, 6 days and even during that time, her right hand woman the paraprofessional was there, as well as her lesson plans.
15. As to Parents’ Exhibit 17, the daily or so log of Student, District Teacher indicated she thought it was not complete. N.T. 1/30/13 at 126-127.
16. District Teacher testified that she sought the input of parents as to the sort of recommendations A.I. DuPont where Student was undergoing behavioral therapy for his behavioral issues and to make certain that she and parents were using consistent strategies for Student’s behavior, but never received from Parents’ or the therapist, any response. N.T. 1/30/13 at 130-131.
17. District Teacher testified that at the IEP meeting on November 2, 2011, the parents and all IEP team members, including Patents concluded that

the Student's Behavioral Plan was to be kept in place, unchanged. N.T. 1/30/13 at 133.

18. District Teacher testified at length at what was in Student's November 2, 2013 IEP and in what fashion it was implemented for Student in her classroom. N.T. 1/30/13 at 134-147, 152-162. As to checking progress, District Teacher testified that she did not just test one day but repeated tests multiple days, random trials in creating Student's present level of function for the November 2, 2011 IEP. N.T. 1/30/13 at 144. With regard to letter recognition it was done on a weekly basis using a program called "Dibels" (N.T. 1/30/13 at 145) until the Student would have met the goal.
19. In Student's 11/2/11 IEP certain items one namely "attention to task" District Exhibit 3, page DX0015 were identified with no goals for Student. District Teacher explained this becomes a vehicle in the IEP for those sorts of issues of Student where there may not be a need for an explicit goal, but nonetheless a need to be addressed. N.T. 1/30/13 at 154-155.
20. However, with issues such as Student following directions, the goal in the November 2011 IEP was more stringent than its predecessor 2010 IEP by reducing the amount of time for Student to follow directions. N.T. 1/30/13 at 157.
21. As to Student's Behavioral Plan, while changes were discussed with Parents at the end it was decided to keep Student's Behavioral Plan in place. N.T. 1/30/13 at 166. Modifications were made based on parental interaction such as when Parents relayed trouble getting Student to eat in the morning, District Teacher suggested and Student started to eat at school, some time in about April, 2012. N.T. 1/30/13 at 167-169.
22. As to Student's behavioral regression at times in spring, 2012, District Teacher testified that also at this time Student had an ear infection and a heavy cast that negatively impacted his behavior. N.T. 1/30/13 at 174-175. At one point parent changed the time of administering a medication to see if that assisted Student's behavior at school. N.T. 1/30/13 at 176.
23. District Teacher did testify that Mother asked her about the lack of aggressive behavior that Student had at school while then coming home and physically assaulting parent(s) and District Teacher responded that she was not an expert but that at school they were very firm and consistent (N.T. 1/30/13 at 177-178) going on to surmise that injuries, medication changes and the organic presentation in Student's brain may explain Student's behavioral regressions. N.T. 1/30/13 at 177-179.

24. District Teacher testified that she had conversations with Parents about Student attending Private School at least as early as February 2012 and that Parents had informed her that they were not certain about Student attending 1<sup>st</sup> grade at Private School, but had suggested that Student attending kindergarten there may be a possibility. N.T. 1/30/13 at 187-190.
25. As to retaining Student in kindergarten, District Teacher testified that Mother approached her since Student was of small and immature (N.T.1/30/13 at 191) and sent her an email concerning asking to have an IEP meeting for the purpose of retaining Student in kindergarten and if that occurred where would Student attend. N.T. 1/30/13 at 195 -196. There was a telephone conversation where she relayed that Mother asked about Student attending a different school, but that District Teacher responded that there were four specialized support kindergartens in District and that could be discussed as an IEP as to where Student would attend, that was not within her control. N.T. 1/30/13 at 196.
26. District Teacher testified that in her email to the principal of her school as to retaining Student for another year of kindergarten, the principal responded that Student's assessments were on par with the "others" in an April 2, 2012 email, District Teacher responded that Student had not "met his math goals and is not progressing with sight words, letter sounds, blending and now our new concepts in Touch Math..."", later explaining that insofar as sight words what she meant was parental dissatisfaction (not hers or the other staff at District) and that letter sounds and blending and math were new topics that had just started (N.T. 1/30/13 at 200-201)<sup>1</sup> and opined that her belief was that Parents were comparing Student to a general education student. N.T. 1/30/13 at 203. As to context of this email, District Teacher explained that when a parent makes a request for retention she is supportive of that request (N.T. 1/30/13 at 204) explaining that in either event, whether Student was in kindergarten or 1<sup>st</sup> grade it would be in a specialized support classroom where the Student's IEP goals would be worked on, so the difference of Student being in 1<sup>st</sup> grade or kindergarten was not that significant. N.T. 1/30/13 at 204-205. District Teacher felt retention would not harm Student. N.T. 1/30/13 at 205. That is on her April 2, 2012 email she was acting as an advocate for Parents request of retention and that District Teacher would not have brought it up without Parent's request. N.T. 1/30/13 at 206.
27. In the 4/26/12 IEP meeting requested by Parents, the decision was made for Student to be retained in Kindergarten and in the Parents

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<sup>1</sup> Later on cross examination, District Teacher testified a time that Student was at a standstill with sight words. N.T. 1/30/13 at 303.

requested another IEP meeting which took place in June, 2012. N.T. 1/30/13 at 209.

28. At this June 2012 meeting, District Teacher had a kindergarten assessment done in May 21, 2012 and when asked by Parents at the June IEP meeting, opined that she felt Student would do well in a specialized support 1<sup>st</sup> grade classroom. N.T. 1/30/13 at 210. At the June, 2012 IEP meeting revision of the Behavioral Support Plan was discussed, but the decision was made to defer that as Student would be at a different school (Other District Elementary School) in the 2012-2013 school year and that it didn't make sense to revise it for the last three (3) weeks of school when the new school may present difference challenges where that which they devise may not work. N.T. 1/30/13 at 211. Later, District Teacher testified that the school year ended on June 12-June 13, 2012 (N.T. 1/30/13 at 314) making this IEP less than a week before the end of school.
29. As to Mother's May 22, 2012 email that Student needed a new behavioral plan, District Teacher responded that, about a month prior, the Student's behavioral plan started being less effective, asked Mother what was working at home and what Student's behavioral therapist said about Student's new behavior issues, following directions being nice to friends. N.T. 1/30/13 at 214. Later on cross examination, District Teacher clarified that parts of the Behavior Plan were not working, not all of it. N.T. 1/30/13 at 285.
30. District Teacher went over District's No. 77 which was Student's Kindergarten Assessment which is used for all Kindergarten student whether or not they have an IEP and indicated Student progressed in: color recognition, name recognition, letter sounds, sight words (from 2<sup>d</sup> to 3<sup>rd</sup> marking periods), concepts of print, "Understanding of Stories Read", identification of geometric shapes, numerals, counting and understanding and name pattern N.T.1/30/13 at 215-225.
31. District Teacher also testified as to Student's progress report, Defense Exhibit 61, a measure of how student was doing with regards to his IEP which was to extend into the next school year and stated that: Student was not meeting goal in number counting as skipping the number 13, but had progressed in the pattern recognition aspect of Math. N.T. 1/30/13 at 229-230.
32. As to Student's Report cards, Parents' Exhibit 15, District Teacher testified that Student progressed for example as to sight words from a 1 to a 2 on a 1 to 3 scale where 1 is the lowest and 3 is the highest . N.T. 1/30/13 at 240.
33. As to Student's social progress, District Teacher testified that Student progressed from at the beginning of the school year to rarely initiating

social interactions to having a best friend, playing with other pupils, talking more, etc.... N.T. 1/30/13 at 244 disagreeing with that written in a later report by Dr. K.'s that Student had no friends despite a desire to have them and had limited interest in what others say or find interesting. N.T. 1/30/13 at 250.

34. As to Dr. K.'s 25 recommendations as to suggested accommodations for Student, District Teacher testified that in her classroom she employed 1 through 14 and 16 through 25 of those.<sup>2</sup> Dr. K. never requested her input in the issuance of Dr. K.'s report. District Teacher disagreed as to Dr. K.'s statement that Dr. K.'s recommended math curriculum was the only major math program that systematically distributes instruction, practices assessments through the Academic year indicating that the one she used at District, Touch Math, also did that (N.T. 1/30/13 at 262-264), and that as to Dr. K.'s recommendations as to program for synthetic-phonetic code emphasis direct instruction., that these were supplied to Student in the Reading Mastery , ERI and tools kit. N.T. 1/30/13 at 264-265.
35. District Teacher testified that Student made meaningful progress in the 2011-2012 school year, that the IEP of November, 2011 used during most of that school year was appropriate and that the 1<sup>st</sup> grade specialized classroom where Student would attend recommended at the June 7, 2012 IEP was an appropriate placement for Student. N.T. 1/30/13 at 266-267.
36. On cross examination, District Teacher testified that the Student's behavioral plan from the year before kindergarten was discussed at the November 2011 IEP meeting, but the decision was not to modify it. N.T. 1/30/13 at 273-274. She testified that no specific IEP goals were drafted with regard to Student's tantrum behavior citing as reasons for this, the lack of Student's presentation of tantrums, and that Student's behaviors did not greatly diverge from those of a general education kindergarten student. N.T. 1/30/13 at 277-278. Additionally District Teacher testified that while the Student's Behavior Plan did indicate the need to have specific IEP goals to target behavior, there was not targeting or monitoring in the November, 2011 IEP. N.T. 1/30/13 at 279-280 and explained the reason it was not addressed in the IEP is that Student while at Elementary School was not exhibiting the sort of behaviors discussed in the Behavioral Plan. N.T. 1/30/13 at 280-281 However, they did not take out the statement about those sort of misbehaviors no longer presenting from the Behavioral Plan. Additionally, no new misbehaviors were added to the Behavioral Plan. N.T. 1/30/13 at 281-282.

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<sup>2</sup> There was nothing asked as to the 15<sup>th</sup> recommendation, Parents' Exhibit 10, P-113 which was "follow a less desirable task with a more desirable task, making the completion of the first necessary to perform the second." N.T. 1/30/13 at 250-262. This may or may not have been an oversight by counsel.

37. District Teacher testified as to knowing of the allegation of an incident where Student flipped a table when upset and was sent to another Elementary School staff member, but that since she was not there could not comment on its severity or what actually happened and did not make a recommendation based upon it to modify Student's Behavioral Plan to draft behavior goals. N.T. 1/30/13 at 284-285.
38. District Teacher testified from 2d to 3<sup>rd</sup> Marking Period Student in terms of starting and completing tasks in a timely manner, listening and following directions, working independently, demonstrating fine motor skills, attentiveness in group situations, following classroom rules and routines. Student was not doing as well, but there was not a huge regression. N.T. 1/30/13 at 294-295.
39. District Teacher acknowledged an incident where Student had spit on Students in a library. N.T. 1/30/13 at 300.
40. District Teacher testified that as to writing Student was struggling, but was improving commensurate with his fine motor challenges, one of which she described as a "light hand" which the panel took to mean a lack of enough pressure on the pencil to create a clear, unwavering line. N.T.1/30/13 at 305-309.
41. As to the May 2012 IEP meeting, where it was recommended Student be retained in kindergarten, District Teacher testified in her opinion Student could have gone to 1<sup>st</sup> grade, but would not be harmed from a repeat of kindergarten so he could better grasp the concepts and despite acknowledging parents concerns as to Student's small stature and immaturity (which she felt were typical to Student's specialized setting but not the general setting) N.T.1/30/13 at 312.
42. District Teacher found that Student met all of the IEP benchmarks except as to behavior, maturity and handwriting by June, 2012. N.T.1/30/13 at 313. This was even though the time to complete the November, 2011 IEP (one year) had not ended.
43. District Teacher testified that as to a spitting incident when Student was at recess and as Student missing a Math lesson because of not listening to directions. However, she classified these events as typical in comparison to kindergartners in a general setting (N.T.1/30/13 at 318-319) and testified on redirect that the misbehaviors while she was present did not cause Student to miss instructional time (N.T.1/30/13 at 321-322), and that there were reports of Student's positive accomplishments as well N.T.1/30/13 at 323.

**B. PHYSICAL THERAPIST (District's 2nd witness)**

1. Physical Therapist was the licensed physical therapist employed by a third party hired by District to work with Student's physical therapy needs during the 2011- 2012 School year so that Student's physical limitations did not limit his access to educational curriculum. N.T. 1/30/13 at 329-332. For example, at the beginning of the 2011-2012 school year Student had difficulty managing his large book bag out the bus and navigating through the school. N.T. 1/30/13 at 343-344.
2. Student's educationally relevant physical therapy needs were: low muscle tone, decreased balance, decreased endurance and decreased postural stability that manifested in Student's impairments in walking through the school building, playing with playground equipment, and postural incorrect sitting which compromise Student's attentiveness as well as possibly worsening over time if not corrected. N.T.1/30/13 at 332-334.
3. Physical Therapist provided Student physical therapy 30 minutes one time per week in a group setting (with one other pupil with a need for similar treatment) plus 60 minutes per month consultative services which included instruction to classroom teachers as Student (such as modifications to physical education to allow Student's success). N.T.1/30/13 at 335-338.
4. Physical Therapist testified as to the adequate progress Student was making in his IEP from Elementary School which was in place until November, 2011. As to the new physical therapy goals which were in the November 2011 IEP and were annual, Physical Therapist testified that Student was making progress towards them. N.T.1/30/13 at 353-361.
5. As to Student's behavioral challenges, Physical Therapist testified that typically this was not an issue and when Student acted out, it was non-cooperation because of Student's frustration where she would modify the activity and then slowly increase it. N.T.1/30/13 at 365-366.
6. Physical Therapist testified that she did not receive a copy of Student's Behavioral Plan and did not even realize there was such a plan and did not in her activities witness the need (although it may have been received by her predecessor physical therapist. N.T.1/30/13 at 372-373. As to Student's misbehaviors these were minimal and easily cured with redirection. N. T. 1/30/13 at 372-374. Where data was collected in the classroom as opposed that collected during group session, another individual collected the data.

**C. OCCUPATIONAL THERAPIST (District's 3rd witness)**

1. Occupational Therapist provided occupational therapy for Student during the 2011-2012 school year. The general role of a school based occupational therapist such as this one is to work on independence in the classroom and school environment. Occupational Therapist worked with Student as to his self help and pre writing skills. N.T. 1/30/13 at 380-381. She increased the difficulty from the old self help skills type goals (that were in place for Student at Elementary School) to include buttoning and zipping, writing skills and letter formation. N.T. 1/30/13 at 382.
2. Prior to the November 2011 IEP, Occupational Therapist tested Student. The results of these tests (at District's Exhibit 16.) showed Student's fine motor precision and manual dexterity were well below average and was below average as to Student's Motor Free Visual Perception. After consult with the District Teacher, Occupational Therapist, recommended twice a small group treatment for thirty minutes formulated to assist Student with self help and letter formation. N.T. 1/30/13 at 386-387, 390.
3. Additionally Occupational Therapist about twice a month would work with Student and Teacher in the classroom. N.T. 1/30/13 at 393.
4. As to measurable occupational goals in the November, 2011 IEP, Occupational Therapist testified about these and are set forth on District's Exhibit 3 DX0017-DX0018.
5. As to Student's behavior during occupational therapy, Occupational Therapist testified that Student was wonderful most of the time, but did have occasional misbehaviors, mostly which were cured with her redirection, but at one point harsh words between Student and another pupil caused her to take Student back to class. N.T. 1/30/13 at 397-401. That occurred once the entire year. N.T. 1/30/13 at 401.
6. In the spring of 2012, there were several weeks where Student refused to do a task, asking for help that he did not need and that Occupational Therapist had seen that with other kindergarten students as well. N.T. 1/30/13 at 406-407.
7. Occupational Therapist testified as to Student's progress in his Occupational Therapy goals and particularly noted as to the self-help skills, buttoning, Student exceeded the benchmark for progress in his IEP, but was still struggling with zipping. N.T. 1/30/13 at 404-405. As to letter formation, Student had reached one benchmark and was working towards another, making significant progress. N.T. 1/30/13 at 407-408.

8. Occupational Therapist reviewed another Occupational Therapy evaluation as Parents' Exhibit 13 done after Student had left District and stated it reflected improvements in certain areas of Student in comparison with the test Occupational Therapist administered in October, 2011. N.T. 1/30/13 at 411.
9. As to Group versus individual therapy, Occupational Therapist testified that Group was more suited to Student as it gave him an opportunity to model and that Student was making progress towards goals and that she had never had a group with more than 3 students. N.T. 1/30/13 at 412-416.
10. As to the occupational testing done at Private School (Parents' Exhibit 24), Occupational Therapist expressed concerns it was given within the 11-12 month window that could allow retest effects that could compromise the test, but that even that test showed improvement to the one she administered. N.T. 1/30/13 at 418-419.
11. As to District Teacher's 4/2/12 email, District Exhibit 47, she expressed that Occupational Therapist did not recall saying this to District Teacher, but that Student at that time was making significant improvement in writing his name he was not quite there yet as compared to general education peers. N.T. 1/30/13 at 420-422.
12. As to occupational therapy, Occupational Therapist testified that Student had made meaningful progress. N.T. 1/30/13 at 423.
13. On cross-examination, Occupational Therapist reiterated there was one time she brought Student back to class for bad language and that Student was not following directions at times, but only did not follow directions about 10% of the time and his behavior was typical to a kindergartner. N.T. 1/30/13 at 425-427. As to the approximate 3 week period where Student was refusing to display skills, this was temporary brief and Student redisplayed skills that were not lost over time and as such there was no deterioration. N.T. 1/30/13 at 429.
14. As to where Student's handwriting was when the June, 2012 IEP was done, she said Student was making sufficient progress towards his annual goal. N.T. 1/30/13 at 434.
15. As to Student's Behavior Plan, Occupational Therapist testified that she had access, but had not read it, when providing services to Student (rather talking to the Teacher about it) (N.T. 1/30/13 at 436-437) and that she did not find occupational therapy as a trigger for Student's misbehaviors. N.T. 1/30/13 at 438.

**D. SCHOOL/EDUCATIONAL PSYCHOLOGIST DR. K. (Parents' 1st witness)**

1. Dr. K. is a nationally certified school psychologist licensed as a psychologist in Delaware with a Doctorate in Education and School Psychology who has done independent educational evaluations for 33 years. N.T. 2/4/13 at 452.
2. Dr. K. performed an educational evaluation of Student on August 6, 2012 which is set forth as Parents' Exhibit 10 and in so doing, reviewed Student's MRI brain study which testified showed Student had a very significant neurocognitive impairment that requires a high level of educational specialization. N.T. 2/4/13 at 454-457. Dr. K. testified that Student suffered from a migratory brain function and she did not know whether the problem would worsen with time, progress and the comparison with some of her test and those by A.I. DuPont suggested the possibility of a progressive issue but also said that another possibility was substandard education. N.T. 2/4/13 at 459-460, 462.
3. Dr. K. testified that in 2007 (in Parents' Exhibit 23) Student tested in the low average range of auditory comprehension, average in expressive communication. However, in February 2010 in Parents' Exhibit 22 Student tested as having trouble with comprehension of directions and instructions, fine motor control, being able to listen and repeat back accurately, putting things together and working with symbols all which would impair Student's ability to learn how to read and write and do math N.T. 2/4/13 at 464.
4. As to Parents' Exhibit 4, page P-52, Dr. K. testified that at that time, 8/3/11 (just prior to Student starting the school year at issue) Student's Wechsler Pre-School and Primary Scale of Intelligent tested low average ID 86-90, his verbal comprehension was in the 16<sup>th</sup> percentile, and Student was in the 27<sup>th</sup> percentile for pattern construction and his pre academic skills were all depressed. N.T. 2/4/13 at 468-469.
5. Dr. K. administered many tests to Student and in comparison Student showed lower than previous results and testified that kindergarten at Elementary School was a disaster in that Student's skill sets had regressed and it did not make sense to retain Student. N.T. 2/4/13 at 472-473.
6. At the time Dr. K. saw Student he just finished summer program at Private School (N.T. 2/4/13 at 473) and apparently had not been taught by District for about 2 months.
7. In comparing the IQ test that Dr. K. administered the Wechsler Preschool and Primary Scale of Intelligence-III (Parents' Exhibit 10, p.85), Student's verbal IQ went down from that the previous year from

86 to 70. Likewise Performance IQ went worsened from 90 to 75, general language composite scales and processing speed all dropped significantly (N.T. 2/4/13 at 477-478), which Dr. K. opined as meaning Student suffered cognitive decline. N.T. 2/4/13 at 479. As to receptive and Expressive language, Student who was 6 years 4 months old tested at below a 4 year level. N.T. 2/4/13 at 482-483.

8. Dr. K. further testified that Student tested showed some characteristics of autism, but did not meet the bar for clinical significance. N.T. 2/4/13 at 483.
9. Dr. K. testified that as to behavior Student started out well during the battery of testing, but worsened as the day proceeded (N.T. 2/4/13 at 488) and by the afternoon was “increasingly inattentive, inflexible thinking disorganized. N.T. 2/4/13 at 489-490.
10. Dr. K. testified that Student suffered from ADHD. N.T. 2/4/13 at 491.
11. Dr. K. testified that speech and language for twice a week for 30 minutes was not adequate for Student. N.T. 2/4/13 at 494.
12. As to Student Behavioral Plan, Dr. K. opined that Student needed serial functional behavioral assessments that evolved as new problem behaviors appear, but did not suggest a defined period but rather suggested an update with setting change such as a school change. N.T. 2/4/13 at 495-498. Dr. K. testified that effective behavior management was necessary for Student to make academic progress. N.T. 2/4/13 at 498.
13. Dr. K. testified that Student has well below kindergarten and prekindergarten levels in listening, comprehension, oral expressions, early reading skills, math reasoning and calculation rendered and while she testified you should meet the child where he is and seemed to day the gap between Student and 1<sup>st</sup> grade was too large to bridge. N.T. 2/4/13 at 501.
14. Dr. K. testified that District should have done an Educational Evaluation of Student. N.T. 2/4/13 at 506.
15. Dr. K. testified that Student’s language delays and articulation problems contributed to his behavior problems at school. N.T. 2/4/13 at 509.
16. As to Math, Dr. K. recommended the use of Saxon Math which was a kindergarten though 12<sup>th</sup> grade curriculum and that Touch Math was not a curriculum (rather was a technique to help you retain Math facts) and Saxon differed from the programs in public schools in not introducing multiple concepts in a single lesson, such as not doing

algebra, geometry, fraction and subtraction in a single lesson. One skill set is worked on. N.T. 2/4/13 at 511-512. However, Dr. K. did not know what curriculum would be administered in 1<sup>st</sup> grade or kindergarten. N.T. 2/4/13 at 512-513.

17. On cross-examination, Dr. K. indicated that she had not worked for a Pennsylvania School District full time as a school psychologist (N.T. 2/4/13 at 514), last worked part time as a school psychologist in 1975 to 1978 in Ontario Canada. N.T. 2/4/13 at 518. Dr. K. did not recall how many hours Student was tested N.T. 2/4/13 at 519. In rendering her opinions as to Student's behavior, no staff information was requested from either District or Private School, as parents did not choose to provide them N.T. 2/4/13 at 521-522, but that lack did not pose an issue since she reviewed the records which were consistent with Parents' reports (N.T. 2/4/13 at 524-525) as well as those she reviewed in the office. N.T. 2/4/13 at 527. Similarly, the GARS-2 and ASDA- had teacher forms that were not collected by Dr. K. in rendering her opinion either from District or Private School. N.T. 2/4/13 at 528. Dr. K. testified that she had not observed Student at Private School and understood Student to be in the first grade at Private School. N.T. 2/4/13 at 529. Dr. K. testified she had not observed a specialized support classroom in Christina School District for over 10 years. N.T. 2/4/13 at 531. As to testifying Dr. K. testified that she testified for a District only once in the last 5 years when last year she had testified in 5 cases. Dr. K. opined she viewed the same as testifying for the Child. N.T. 2/4/13 at 533.
18. Dr. K.'s only source of knowledge of the kindergarten at Elementary School where Student went was from the IEP and parents and that as to the 1<sup>st</sup> grade program in the June 2012 IEP was that the general ed curriculum would be followed and Student would be in a program with learning support (N.T. 2/4/13 at 536), and had no idea what the accommodations would be made for Student. N.T. 2/4/13 at 539.
19. Dr. K. could not make a projection that Student could go through a 1st grade program in District only that she felt that an alternative curriculum was needed not a general education curriculum adapted. N.T. 2/4/13 at 540.
20. Dr. K. did not know whether Student was receiving behavioral therapy. N.T. 2/4/13 at 542.
21. As to the Private School IEP, Dr. K. testified it was too vague (although it is believed she was referring to that in District) when she later testified that it was more detailed than District's. N.T. 2/4/13 at 547. However, she admitted that Private School's IEP did not prescribe the Saxon math program but that she knew from other sources that Private School used that program. N.T. 2/4/13 at 547-548.

**E. STUDENT'S MOTHER (Parents' 2nd Witness)**

1. As to Parents' Exhibit 17, the log of communications she said it was complete, except for the last two days of school. N.T. 2/4/13 at 556.
2. Mother testified that she wants Student to be able to thrive and progress in an educational setting where he is happy so he can become an independent productive member of society without social or addiction problems. N.T. 2/4/13 at 558-556.
3. Student was born prematurely with numerous medical problems. As an infant Student needed a sleep apnea monitor, had a tear block surgery, tubes for his ears, respiratory issues significantly worse for premature children, torticollis (a deformation in the neck that ultimately required surgery when Student was a toddler). N.T. 2/4/13 at 562-565. Student has been involved with Child Watch Development since Student was twelve weeks of age, every 6 months. N.T. 2/4/13 at 566-567.
4. Gross motor delayed developments were noticed first for Student followed by communication delayed development. N.T. 2/4/13 at 568. Around the time Student was 16-17 months until three, he exhibited biting other children as well as Parents. N.T. 2/4/13 at 569. Student also banged his head, had language delays and while post-surgery at about 18 months walked independently, he did not run. He could not hold a crayon. N.T. 2/4/13 at 572.
5. Student had an IEP while in preschool at Elementary School and initially the focus was on physical therapy and then moved on to address student's speech and then behavior. N.T. 2/4/13 at 575.
6. Ultimately, on July 4, 2010, Mother testified to learning that Student suffered a brain abnormality and the physician was not certain of the progression of the abnormality however, indicated that Student would have dyslexia, and likely to have seizures. N.T. 2/4/13 at 579.
7. Mother testified that Student exhibited obsessive compulsive behaviors, and hit his parents at home. N.T. 2/4/13 at 585.
8. Mother at a Dr.'s recommendation sought Behavioral management for Student which included behaviors at home. N.T. 2/4/13 at 589.
9. Student was punching and hitting, pulling hair of parents as well as other Pupils, would have tantrums, injure himself and had problems transitioning. There was the use of nasty words, sleep issues both in getting to sleep and in getting up at night screaming, issues with bowel movements.

10. As to the private behavioral therapy Student was receiving while at District, Mother reported that different techniques were explained some of which worked some times and other times did not and in August 2012 Mother discontinued as Student was having social problems, and there were no good suggestions and Mother believed they were not getting anything out of it. N.T. 2/4/13 at 597-599. Student has not started the play therapy suggested at Private School due to expense. N.T. 2/4/13 at 600-601.
11. Mother testified that she was sharing the strategies that she learned at A.I. DuPont's behavioral therapies with District Teacher. N.T. 2/4/13 at 602.
12. Mother testified that Student behaviors were affecting him at Elementary School because Student would run out of the room, not complete tasks, or follow directions. N.T. 2/4/13 at 607.
13. Mother testified that she felt Elementary School was a good fit for Student and expressed resentment at having to remove him because it was in a different district, which led to having to find new day care for Student N.T. 2/4/13 at 608-609.
14. Student's feeder school was Other District Elementary School, but as Other District Elementary School did not have a specialized kindergarten, Student went to Elementary School. N.T. 2/4/13 at 611.
15. Just prior to the start of Student's school year, Parents received the psychological assessment from A.I. DuPont set forth as Parents' Exhibit 4. Mother testified it was sent to District on October 6, 2011. N.T. 2/4/13 at 617-619, 621.
16. Mother requested an IEP to consider the testing in Parents' Exhibit 4 on October 4, 2011 to reevaluate behavioral and physical therapy goals and get speech services increased and Mother's recommendation as to use of a slant board. N.T. 2/4/13 at 622-624.
17. Mother testified that speech language services were increased. N.T. 2/4/13 at 625.
18. Mother testified that she communicated with District Teacher about Student's behavioral issues, and it was discussed at the November IEP meeting, but that the decision was made not to change it since Student only started at Elementary School 6 weeks prior and communication between Parents and students would be open at it would be modified in the future if needed. Parents signed that IEP. N.T. 2/4/13 at 628.
19. Mother testified that despite signing that she had received a copy of the Procedural Safeguards at the end of the November 2011 IEP meeting,

she did not receive them and she did not remember if she was offered them. N.T. 2/4/13 at 629. Mother went on to testify that the first time she got the Procedural Safeguards was in June, 2012. N.T. 2/4/13 at 630.

20. Student's medication changed once during 2011-2012 school year according to Mother at the teacher District Teacher's suggestion and Student fell asleep in class. N.T. 2/4/13 at 632-634.
21. Mother testified that she did not believe Student was tardy 14 times, estimating it as closer to 5, explaining that nobody ever told them the school needed notes for the Doctor's appointments. N.T. 2/4/13 at 638.
22. Mother stated that she did not request that Student be retained for kindergarten. N.T. 2/4/13 at 639. Instead, Mother spoke to District Teacher asking her opinion on retention in March, 2012 based on feedback from Private School, A.I. DuPont's Evaluation and lack of progress at Elementary School (N.T. 2/4/13 at 639-640) and that District Teacher recommended retention and said that in the Other District Elementary School, Student would be in a general education classroom and be pulled out for specialized support where Student would be with children in grades 1 through 5 and expressed love for Private School and would send her kid there. N.T. 2/4/13 at 642-643.
23. Mother explained that the reason she did not sign the prior written notice for the April, 2012 meeting was because it was District Teacher's idea to retain student. N.T. 2/4/13 at 644. Similarly, at the April 26, 2012 IEP meeting the District indicated to Mother that She/Mother wanted Student retained and that is why we are here and Mother disagreed as she thought District was going to say it was District's idea to retain (not Mother's) and District was recommending the same program which was another reason they did not sign. N.T. 2/4/13 at 645-646.
24. Mother testified that Student's behavior started to regress in November, 2011. N.T. 2/4/13 at 646. As to speech as of April 26, 2012, Mother testified that Student made some progress; in physical therapy student progressed, but in occupational therapy student regressed. N.T. 2/4/13 at 647. District suggested no revisions to Student's Behavioral Plan. N.T. 2/4/13 at 648.
25. Mother testified that the June 7, 2012 IEP meeting occurred because they could not agree at the April 26, 2012 IEP meeting for the reasons set forth above.
26. At the June 7, 2012 IEP meeting they took a vote as to whether Student would be promoted to 1<sup>st</sup> grade or retained and Mother's position was that she did not know as the District, not she, were the specialists in

education and additionally no specific recommendations were made as to Student's behavioral plan. N.T. 2/4/13 at 650-651.

27. As to Student's classroom at Elementary School, initially Mother said she had no concerns, but she developed concerns when she heard reports of Student's misbehavior with no solutions and did not even know who was teaching Student when District Teacher was out. N.T. 2/4/13 at 653-654.
28. Mother did not invite the Behavioral Therapists who were treating Student to the IEP meeting due to expense and as to not providing the Behavioral Therapist written records to the IEP Team stated that she believed the Behavior Therapists would only release them to physicians. N.T. 2/4/13 at 660-661;
29. Mother stated that Student started attending Private School in June 30, 2012 and noticed an increased confidence in Student, Student was coloring more.
30. As to today Mother stated Student had more confidence, was happy, but still had behavior issues, but was progressing with his name and writing and speech was better N.T. 2/4/13 at 664-666.
31. Mother indicated she would consider reenrolling Student in public school. N.T. 2/4/13 at 667.
32. As to hitting, Mother indicated that Student still does hit her but it had decreased since he started attending Private School. N.T. 2/4/13 at 668. For example, while at Elementary School Mother was getting hit by Student 15 times a day and the same, if not more at the end of the school year at Elementary School and at present, Student was only hitting Mother six times a day. N.T. 2/4/13 at 669-671.
33. Mother testified that for the month of August 2012 Student was at an unstructured day care and during that time Student was hitting more. N.T. 2/4/13 at 671.
34. Mother testified that Private School does not have grade levels but if you had to correlate Student was in kindergarten as the other pupils are 6 years of age. . N.T. 2/4/13 at 676-677.
35. On cross examination, Mother revealed that they (Parents) first visited Private School in October, 2011. N.T. 2/4/13 at 677. This was before even the first IEP in Elementary School on November, 2011, explaining the contradiction from her prior answer as having first started looking at Private School in February, 2012, as the October, 2011 was a mere tour. N.T. 2/4/13 at 677.

36. On cross examination, Mother testified that Student hit his teacher at Private School, but could not recall the number of times, as Private School does not report every hit. N.T. 2/4/13 at 681.
37. In Private School, Mother testified there was not a separately named behavioral plan in the IEP but that behaviors were set forth on Parents' Exhibit 25, P-453, P-454, P-461 and P-462 and that Private School had not done a functional behavioral assessment. N.T. 2/4/13 at 685.
38. Cross examination of Parents' Exhibit 25, P-462 reveals that Private School was indicating that in the fall of during unstructured times Student at Private School was not keeping his hands and feet to himself 3 to 4 times a day and on many other behavioral measures was at the lowest end of the spectrum as of 11/15/12. Mother later testified that Student's hitting and kicking had decreased.
39. Additionally, Mother on cross acknowledged that the IEP at Private School did not offer therapeutic services. N.T. 2/4/13 at 687.

**F. PRIVATE SCHOOL TEACHER (Parents' 3rd witness)**

1. Private School Teacher is Student's present teacher at Private School, where she has taught for 27 years. N.T. 2/14/13 at 699.
2. Private School was not a graded school, which she explained that the school looks at the children developmentally and emotionally, and tries to place the children so they are as cohesive as possible. N.T. 2/14/13 at 700-701.
3. Student went to summer school at Private School and Student's admission for the fall was contingent upon whether Private School could program for Student. N.T. 2/14/13 at 702.
4. Private School Teacher testified as to Student's day at Private School, which starts with 20 minutes of free Social time then goes to Calendar time and then Math for about 45 minutes, then snack; the child picks a story and it is read and then puzzle time/ free time. Pull out for occupational therapy generally occurs during reading, then lunch, recess and then performing arts, art, library and one afternoon gym.
5. Private School Teacher testified that the school psychologist sees Student twice a week (N.T. 2/14/13 at 711-712), later clarifying that he comes to the class and Student had a couple of therapy sessions. She and the Psychologist work together on getting strategies for student's behaviors that work. Some do. Some don't. N.T. 2/14/13 at 727-728.
6. In the summer, Student struck Private School Teacher 4 to 5 times a day. Student did not want to learn and had impulsivity issues and was inflexible. N.T. 2/14/13 at 714-715.
7. Private School Teacher stated that Student at Private School was progressing with flexibility, impulsivity and that he was beginning to display empathy as well as toileting and putting his coat on.
8. As to hitting, Student had progressed at Private School from the start where it was occurring every day at least 4 to 5 times to not occurring daily, not hitting in the last 5 days prior to the hearing (N.T. 2/14/13 at 714-715) Student was not negatively commenting about peers as often (N.T. 2/14/13 at 720) or interrupting as often. (N.T. 2/14/13 at 721).
9. As to academic, Private School Teacher testified that Student's attention span had increased and his stamina had increased, but was still low. N.T. 2/14/13 at 722.
10. As to being sent back from therapy, Private School Teacher answered that this was for short periods and rarely occurred.

11. Private School Teacher testified that the pupils in her class are guided to make their own behavioral rules in the beginning and add their own and these are sent to all staff working with the children. N.T. 2/14/13 at 726-727. As to Student's particular behavior plan, that is constantly revised. N.T. 2/14/13 at 728-729.
12. Student is also exposed to a Social Intelligence class where lessons such as to give other individuals space and anti bullying is taught often using popular children's books. N.T. 2/14/13 at 731-732.
13. Private School Teacher described Student's behavior as fragile, but once he performs well for a month straight, then perhaps they can modify his IEP.
14. As to reading at the beginning of the summer of 2012, Student only displayed knowing a couple of words (N.T. 2/14/13 at 736), but was not easy to test because he was uncooperative. N.T. 2/14/13 at 738. However, he was beginning to slowly pick up words. N.T. 2/14/13 at 738. As to writing Student could write his name on 2/14/13 but not at the beginning of the summer, 2012.
15. In the summer, Private School Teacher did not use a kindergarten program (N.T. 2/14/13 at 741), but on cross-examination was for pre kindergarten skills. N.T. 2/14/13 at 746.
16. From the start of Student's 2012-2013 year at Private School until 11/15/12 he did not have an IEP.
17. On cross-examination as to the ages of the pupils in Student's class at Private School all but two were six and one was younger and Student would be seven in March.
18. Student during the school year received speech and language and occupational therapy in a small group twice a week and once a week they do the whole class a push in. N.T. 2/14/13 at 765.

**G. STUDENT'S FATHER (Parents' 4th witness).**

1. Father's goals for son were to progress in academics such as he could be reintegrated into public school and eventually go to college. N.T. 2/14/13 at 771.
2. Father testified that at the end of 2011 he had a conversation with the speech therapist where he indicated Student needed speech therapy three times a week and the speech therapist indicated that that was unlikely. N.T. 2/14/13 at 772,
3. Father testified he first received the Procedural Safeguards after they noticed Student's withdrawal from the school. As to signing that he received it in the IEP, Father testified that he was just mechanically following the District's instructions without carefully reading. As to the first time Father said receipt of the Procedural Safeguards would have mattered, that was at the April 2012 IEP meeting. N.T. 2/14/13 at 777.
4. Father testified when he dropped Student back from his Friday Behavioral therapy Sessions he would briefly talk to presumably District Teacher about what he had learned that day as to Student; needs that day (i.e. Student needed a quiet environment that day). N.T. 2/14/13 at 786.
5. Father testified that his issue was not so much the original, suggestion that Student be retained in kindergarten, but that Student go to the same kindergarten that had failed him in every way. N.T. 2/14/13 at 788-789.
6. Later Father was baffled at the vote at the June, 2012 IEP meeting to promote Student which took place after parents indicated that District should tell us what was best. N.T. 2/14/13 at 791. There was no offer of an academic or behavioral evaluation.
7. He also relayed an incident where Father was told Student pulled down his pants and smacked his buttocks. N.T. 2/14/13 at 793.
8. Father testified that they received no aide for Private School and that with daycare the cost was \$32,000 a year and that he and wife drove to pick up and return 15 miles each way. N.T. 2/14/13 at 796.
9. Father testified that Student's behavior had improved. Recently, Student displayed ownership for the first time for misbehaviors and he was re reading after Father read him small books. N.T. 2/14/13 at 797. Student had improved in his writing. N.T. 2/14/13 at 799. Student now looks you in the eye when he speaks. N.T. 2/14/13 at 798.

10. On cross Father testified that he indicated that A.I. DuPont in their August 2011 evaluation had recommended speech therapy 3 times a week, but when he reviewed the document that language was missing. Then he modified to say that the doctor orally told them that, but that he never asked for it in writing. N.T. 2/14/13 at 801-805.
11. As to their lack of receipt of Procedural Safeguards, Father's testimony seems to be that he trusted the IEP team and simply did not see a reason to get the Procedural Safeguards at the Elementary School IEP and declined them but they were offered to him. N.T. 2/14/13 at 809, 811, 828.
12. Father testified that Student only knew three words when he started the summer program at Private School in July 2012 (N.T. 2/14/13 at 819) but was unclear on this in recross (N.T. 2/14/13 at 825), where he indicated the possibility that district had seen something they had not.
13. Father also testified as to Student's bus being late and complaining but later indicated there was no correlation to the late bus and Student misbehaving. N.T. 2/14/13 at 826.
14. Father said that Dr. K. told him a public school could not handle his son. N.T. 2/14/13 at 827.

#### **H. SPEECH/LANGUAGE THERAPIST (District's 4th witness)**

1. Speech/Language Therapist is a Delaware licensed speech therapist who provided speech and language services to Student his 2011-2012 school year at Elementary School. N.T. 2/14/13 at 833.
2. Speech/Language Therapist did her own speech and language evaluation of Student in District's Exhibit 15 where she indicated Student had needs in receptive language, understanding, language expression and articulation. N.T. 2/14/13 at 835.
3. Speech/Language Therapist was in District Teacher's classroom on Wednesdays Thursdays and Fridays for about 45 minutes in the morning and testified some of the same speech language concepts she was working on with Student were done in District Teacher's classroom. N.T. 2/14/13 at 843.
4. As a result of Student's speech and language needs, Speech/Language Therapist recommended increasing student's services to once a week pull out and once a week push in and gave Student more services than that (N.T. 2/14/13 at 847-848), which included times when there was collaborative instructions with the occupational therapist and teacher. N.T. 2/14/13 at 852-854. The 30 minutes push in was specific to Student's needs. While what Speech/Language Therapist recommended was minimums, Speech/Language Therapist testified that she actually saw Student 4 times a week. N.T. 2/14/13 at 922-924.
5. As to the push in services, Speech/Language Therapist described these as best practices. N.T. 2/14/13 at 855.
6. In the November 2011, Speech/Language Therapist testified that new speech and language goals were created as Student had mastered those at Elementary School. (N.T. 2/14/13 at 860) and that she had taken into account the A.I. DuPont Study of August 2011. (N.T. 2/14/13 at 863).
7. Both Parents at different times attended Speech/Language Therapist's sessions with Student and were impressed. N.T. 2/14/13 at 869. Additionally, there was constant positive communications some when Student would make a break through such as in April of 2012 when Student finally got the K sound at the end of a word and reports from Father that Student had gotten the games home for the "S" structures and was doing well. N.T. 2/14/13 at 876.
8. As to Student's behavior during Speech/Language Therapist's therapy, most times it was testified that he was well behaved and that short periods of Student not wanting to work on the exercise were

circumvented by a combination of ignoring the reluctance or a reward system to promote getting back to the work. N.T. 2/14/13 at 870.

9. Speech/Language Therapist testified that the Student's Behavior Plan was thoroughly reviewed and discussed at the November, 2011 meeting. N.T. 2/14/13 at 873.
10. As to Student's overall progress, Speech/Language Therapist testified that Student made steady/satisfactory progress towards goals (N.T. 2/14/13 at 874, 879-881) and in one note of May 2012 reported excellent progress. N.T. 2/14/13 at 878.
11. Commenting about Parents' Exhibit 12, an August 2012 Speech and Language Evaluation (after Student started at Private School and left District), Speech/Language Therapist did not see any new information (N.T. 2/14/13 at 883) and commented that some of the results may have been due to testing methodology being done over one rather than many days as she had done for Student. N.T. 2/14/13 at 886.
12. Speech/Language Therapist testified that most if not all of Dr. K.'s 25 recommendations were being done for Student at Elementary School/District during the 2011-2012 school year. N.T. 2/14/13 at 889-897.
13. Speech/Language Therapist testified that Student could be successful in a specialized support setting in District in first grade. N.T. 2/14/13 at 899.
14. On cross examination, Speech/Language Therapist testified that the last time she supplied speech and language therapy 3x a week was about 5 years ago. N.T. 2/14/13 at 901.
15. As to what Speech/Language Therapist told Educational Diagnostician as to the number of therapy sessions, she could not recall specifically. N.T. 2/14/13 at 903, but testified that she did not believe additional therapy sessions for Student would have lessened Student's misbehaviors or enhanced Student's education. N.T. 2/14/13 911.
16. As to Student's behavior changes throughout the year, Speech/Language Therapist did not see worsening towards the end of the year. N.T. 2/14/13 at 915.
17. On cross as to one of the Boehm sections, Student in the beginning of the year was score of 20, but at the end was a score of 42, which was one point short to show an improvement on a 1 to 3 scale from a 1 to a 2.

18. As to Student's behavior, Speech/Language Therapist read the Student's Behavioral Plan, but that Student was well behaved for her and she saw no tantrums. N.T. 2/14/13 at 924.
19. As to District Policy, she testified there was no District policy not to provide a pupil speech and language pull out services 3 times, 4 times a week, rather what a pupil received depended on the pupil's need. N.T. 2/14/13 at 934.

**I. EDUCATIONAL DIAGNOSTICIAN (District's 5th witness)**

1. Educational Diagnostician was the District's Education diagnostician when Student attended Elementary School during the 2011-2012 school year. She has been an educational diagnostician for in excess of five (5) years. District's Exhibit 84.
2. Educational Diagnostician testified that she did not notice any extraordinary misbehavior of Student during the 2 or more times a week she was in District Teacher's class and that as to following directions, Student was easily redirected to go back on point. N.T. 2/14/13 at 947. Educational Diagnostician did observe District Teacher using Student's Behavioral Plan. N.T. 2/14/13 at 949.
3. At the November 2, 2011 IEP meeting, Educational Diagnostician testified that Student's Behavior Plan was discussed at length and while some of the behaviors it referenced were not occurring, the joint decision was not to modify it in the event they resurfaced and the parents felt the same way. N.T. 2/14/13 at 956.
4. As to Student's behavior throughout the year, Educational Diagnostician said that from what she saw there were times it worsened and times it was better, but that it was variable rather worsening over time or improving over time and that Student exhibited typical kindergarten behavior. N.T. 2/14/13 at 958.
5. Educational Diagnostician testified to offering Parent a copy of the Procedural Safeguards at the November 2, 2011 meeting (N.T. 2/14/13 at 961) and contradicted Parents testimony that they felt rushed to sign by noting that Parent's signed that IEP on November 8, 2011, 6 days after presentation of the IEP at the meeting and that it was amended at Mother's request approximately 6 days post meeting to add zipping and unzipping of jacket to self help skills and other changes. N.T. 2/14/13 at 962-966.
6. Educational Diagnostician testified that she heard of the proposed kindergarten retention from Mother indicating that first it came to District Teacher and then it came to her (from whom is not stated). N.T. 2/14/13 at 968.
7. At the April 26, 2012 meeting, Educational Diagnostician testified that Parents requested Student's retention in Kindergarten based upon their perception that Student was not progressing in areas such as writing his name and counting objects and was immature. Educational Diagnostician indicated that she did feel Student was making progress and the matter was discussed, but ultimately as Parents felt strongly about kindergarten retention, the IEP team agreed to it. N.T. 2/14/13 at

973. Educational Diagnostician stated she felt that one reason the parents wanted to show retention was because Private School wanted it and that may work in Student's favor (presumably for admission to Private School). N.T. 2/14/13 at 974-975,
8. Concerning retention of Student in Kindergarten at the 4/26/12 meeting, District felt it would meet Student's needs as outlined in the IEP (which would govern Student's educational access) whether Student was placed in kindergarten or 1<sup>st</sup> grade. Retention in kindergarten was of no harm to Student (N.T. 2/14/13 at 975) and that at the end of the meeting District was confused, but that Educational Diagnostician had indicated to Parents the existence of two (2) other buildings where there were specialized support kindergartens in District but did not get back to Parents until June. N.T. 2/14/13 at 975.
  9. As to why the IEP goal was not changed if Student were retained, Educational Diagnostician testified that Student from information from December, 2011 was meeting all his IEP goals save one. N.T. 2/14/13 at 978.
  10. As to retention, Educational Diagnostician testified District was trying to comply with a request from Parents that would not harm Student (N.T. 2/14/13 at 979 ) and in April, 2012, the IEP team was developing a Plan in the event Student did not get into Private School as Mother indicated predilection for Private School. N.T. 2/14/13 at 980.
  11. Educational Diagnostician testified as to District's Exhibit 8 page DX0034, she did not agree that Student did not possess the necessary skills for promotion to 1<sup>st</sup> grade (N.T.. 2/14/13 at 981) because his promotion would be to a 1<sup>st</sup> grade in a specialized setting, which differed from a general education promotion which requires the skills commensurate with that grade as there is no IEP. N.T. 2/14/13 at 981-983.
  12. At the IEP meeting of June 7, 2012, Parents clearly indicted they did not see sense in keeping Student at Elementary School where they felt he had not made enough progress and they discussed retention at another building. District Teacher presented the kindergarten updates Parents expressed uncertainty as to kindergarten or 1<sup>st</sup> grade and the team voiced their opinion which was placement in a specialized support 1<sup>st</sup> grade classroom at the Other District Elementary School. N.T. 2/14/13 at 986.
  13. Educational Diagnostician testified the configuration of the specialized support 1<sup>st</sup> grade was one where Student would go to a homeroom with general education students and transition to a specialized support

classroom for their instruction with push ins for lunch recess and specials. N.T. 2/14/13 at 990-991. Student would remain in a C setting meaning Student would remain in a regular general education classroom less than 40% of the time. N.T. 2/14/13 at 995-996. Educational Diagnostician further testified as to nobody contacted her or influenced her decision which was based on Student's progress. N.T. 2/14/13 at 996.

14. As to the behavior Plan, it was discussed that District did not want to remove anything as Student would go to a new school where the challenges may differ. N.T. 2/14/13 at 997.
15. Student was additionally offered Extended School Year a half day summer program 4 days a week where Student would receive Speech, occupational therapy and physical therapy services. N.T. 2/14/13 at 1000.
16. Educational Diagnostician testified that she gave the parents a copy of the Parental Safeguards June 7, 2012, specifically noting it was the brand new version. N.T. 2/14/13 at 1001.
17. On cross Educational Diagnostician testified that District Teacher who was duly certified in general and special education did attend the November, 2011 IEP meeting as well as a general education teacher. However, the art, gym and music teachers did not go to this meeting. N.T. 2/14/13 at 1003.
18. On cross as to the procedural safeguards, Educational Diagnostician testified that she offered and parents declined a copy of the Procedural Safeguards at the November, 2011 IEP meeting and April 26, 2012 IEP meeting. N.T. 2/14/13 at 1004.
19. Up until the June, 2012 meeting, Educational Diagnostician thought the IEP team was discussing Student retention in Kindergarten. N.T. 2/14/13 at 1018.
20. Educational Diagnostician testified that if child was to be retained she felt it best for student to go to a different classroom. N.T. 2/14/13 at 1020-1021,
21. On cross exam, Educational Diagnostician indicated that Student had infrequent tantrums at Elementary School. N.T. 2/14/13 at 1025.

**J. SCHOOL PSYCHOLOGIST (District's 6th witness)**

1. School Psychologist was district's witness, a Delaware licensed psychologist and a certified school psychologist from 1988 to present. District's Exhibit 82.
2. School Psychologist testified that at the November 2011 IEP meeting, the team discussed the new evaluation that Parents presented from A.I. DuPont, went over the reports for occupational therapy and physical therapy, went over the speech language report, the Behavior Plan from Elementary School (which she testified was a good plan based on best practices and was left in place). N.T. 3/6/13 at 1037-1044.
3. School Psychologist testified that District Teacher was modifying management of her classroom to the behavioral plan and that the behavioral plan was being successfully implemented. N.T. 3/6/13 at 1045.
4. School Psychologist testified that the Student's classification was discussed at the November 2011 IEP meeting and agreement reached that Student would be classified as "Other Health Impairment" ("OHI"). N.T. 3/6/13 at 1046-1047. Later stating that while she read Dr. K.'s report she would not change the Student's eligibility classification and that in any event eligibility classification did not drive services, rather the driving force was the child's need. N.T. 3/6/13 at 1062.
5. School Psychologist testified that she visited District Teacher's classroom twice a day and that Student behavior was typical for that classroom. School Psychologist testified about an incident where at the end of the day, in preparing for dismissal, Student pushed another pupil out of the way to get a chair to which thereafter District Teacher modified how pupils were dismissed one at a time instead of all at once. N.T. 3/6/13 at 1037-1044, 1049-1051.
6. As to the April 26, 2012 IEP meeting, School Psychologist testified similar to the other witnesses that it was Parents idea at that time for Student to attend Private School and that Parents wanted retention to further this purpose and that the reason it was agreed to by the team was that the driving force in Student's education was not grade, but his IEP and that as a team they differed to Mother's wish to retain. N.T. 3/6/13 at 1054-1055.
7. As to the June 2012 IEP meeting, when Mother asked for District's opinion about retention, the Team gave their opinion based upon the newest data (that they did not have at the April, 2012 meeting) and recommended promotion to a 1<sup>st</sup> grade specialized support classroom (which would usually have 1 teacher, a paraprofessional and 6-7

children). N.T. 3/6/13 at 1056-1057. This classroom would be similar to that which Student was in Kindergarten at Elementary School and that was discussed with parents at the June, 2012 meeting. N.T. 3/6/13 at 1060-1061. Moreover, at the June, 2012 meeting District informed parent that the setting C which was maintained required Student to be in a specialized setting over 60% of the time. N.T. 3/6/13 at 1064. Additionally, at the June, 2012 IEP meeting the behavior plan was discussed and it was decided to be kept. N.T. 3/6/13 at 1065-1066.

8. School Psychologist testified that because of Student's ADD and young age, Dr. K.'s test should not have all been done in one day. N.T. 3/6/13 at 1063
9. School Psychologist described Student encountering two rough spots concerning behavior one in March and another in May, 2012. More specifically, School Psychologist testified that the Student's behaviors while at Private School (as described in Parents' Exhibit 25) were worse than she had observed at Elementary School. N.T. 3/6/13 at 1068-1069.
10. On cross examination, School Psychologist testified that she never recommended that the Behavior Plan be revised. N.T. 3/6/13 at 1082, 1084.
11. Further as to certain misbehaviors Student was exhibiting, School Psychologist testified that the misbehaviors were not detrimental academically as Student was progressing and the misbehaviors were similar to those of Student's developmental age. N.T. 3/6/13 at 1087.
12. School Psychologist testified that if Student attended 1<sup>st</sup> grade at the Other District Elementary School, Student would go to one classroom and stay there but would go out for specials, music library, lunch and that he would be with students the same age as himself. N.T. 3/6/13 at 1099-1100.
13. School Psychologist testified that there was discussion about Student repeating kindergarten at a school other than Elementary School (with a teacher other than District Teacher), but did not recall where. N.T. 3/6/13 at 1101-1103.

**K. DIRECTOR OF SPECIAL SERVICES (District's 7th witness)**

1. Director of Special Services has oversight responsibility for pupils eligible under IDEA and Section 504 of the ADA and is a compliance officer to make certain children such as Student receive a Free Appropriate Public Education ("FAPE"). Her resume is attached as District's Exhibit 85. N.T. 3/6/13 at 1105-1106.
2. Director of Special Services testified that District Teacher was a high quality special education teacher. N.T. 3/6/13 at 1110.
3. Defining different Settings for District, Director of Special Services testified that Setting C required that student spend less than 40% of his time in a general education environment. Setting D was homebound instruction and Setting E was a separate school. N.T. 3/6/13 at 1112-1113.
4. At the time Student attended kindergarten at Elementary School in the 2011-2012 school year, there were only 9 kindergartners including Student in setting C out of about 1900 kindergartners in the entire district. N.T. 3/6/13 at 1114.
5. Director of Special Services testified that the November 2, 2011 IEP was not vague, but rather appropriate based upon her review of all of the Exhibits in the case. N.T. 3/6/13 at 1116.
6. As to not modifying the Behavioral Plan at the June, 2012 IEP, based upon the detail of the Behavioral Plan and the soon end of the school year, Director of Special Services testified that it would be appropriate to carry forward the Behavioral Plan for the next year. N.T. 3/6/13 at 1118.
7. Director of Special Services testified that the specialized support classroom where Student would be placed in 1<sup>st</sup> grade at the Other District Elementary School had 2 1<sup>st</sup> graders and 6 kindergartners (8 students total) and 1 teacher and a paraprofessional. Their days started with a reading specialist who worked with the 1<sup>st</sup> grader and 2 general education 1<sup>st</sup> graders (N.T. 3/6/13 at 1120) and that while the numbers vary, students in specialized support classrooms are grouped with those of similar ages and never have over 12 students and instruction is at a slower pace N.T. 3/6/13 at 1122, 1124, 1126,
8. Director of Special Services testified that in her opinion, the placement of Student at the Other District Elementary School specialized support 1<sup>st</sup> grade was appropriate. N.T. 3/6/13 at 1126.
9. Director of Special Services similarly testified that Student was provided FAPE and made meaningful educational progress at Elementary School during the 2011-2012 school year. N.T. 3/6/13 at 1128, 1129.

10. Director of Special Services testified that there was no significant educational loss to Student from the transportation as the Bus was never past 9 when Elementary School started and that what occurs is that with this Bus is targeted to arrive early at 8:20.a.m. to provide a cushion since the children it transported have special challenges (such as car seats, potty training) that cause delays. Additionally, for the same reason, the parents are informed that 10 to 15 minute leeways were necessary. N.T. 3/6/13 at 1132-1133.
11. Director of Special Services testified that 55 students in the District receive speech and language services 3 times a week in the 2011-2012 school year (N.T. 3/6/13 at 1136), but no students were receiving direct service occupational therapy 3 times a week. N.T. 3/6/13 at 1140.
12. As to the District not amending any of Student's goals and objectives in the June 2012 IEP, Director of Special Services testified that this was appropriate as while Student was making progress toward the goals, he had not mastered them. N.T. 3/6/13 at 1143.
13. As to not modifying the Behavioral Plan, Director of Special Services testified that was because it was research based and emphasized reward rather than punishment and because with children Student's age there was a typical amount of misbehavior. N.T. 3/6/13 at 1145-1146.
14. On cross examination, Director of Special Services testified that all opinions she testified in this case were based on review of records and she had not observed Student in class (N.T. 3/6/13 at 1148-1149), and had never testified that District had failed to offer FAPE (N.T. 3/6/13 at 1150), but that she would not be at the hearing if she believed FAPE were not offered. N.T. 3/6/13 at 1148-1149.
15. As to the April 26, 2012 proposed retention, Director of Special Services testified that she did not take issue as it was requested by a parent and parents know their children and are collaborators in the creation of an IEP and when they state a preference to retain because a child is small of stature, they are not going to protest.
16. As to the lack of goals for tantrum behavior, Director of Special Services testified that they do not have to be drafted in this instance as there is a positive behavior support plan in place. N.T. 3/6/13 at 1152-1153. As to it not being revised during the school year, she testified that the District could have done a better job at documenting the strategies they were using (N.T. 3/6/13 at 1154-1156), using as an example the modification of the dismissal procedure to a one at a time dismissal (N.T. 3/6/13 at 1158), but this omission was not flawed enough to prevent Student from accessing education in the 1<sup>st</sup> grade (noting it was not always practical to expect every modification to be added on). N.T. 3/6/13 at 1158-1159.

### **III. MAJORITY'S FINDINGS OF FACTS**

1. Student at the time of the hearing and request was a six (6) year old attending Private School for the 2012-2013 school year with fellow children of an age equivalent to Kindergarten. Private School is not divided into what one typically considers grades.
2. Formerly, in the 2011-2012 school year, Student attended a specialized support kindergarten at the Elementary School in the Christina School District.
3. Student's feeder school for kindergarten was the Other District Elementary School, but as the Other District Elementary School in 2011-2012 did not have specialized support kindergarten, he went to Elementary School.
4. When Student started the 2011-2012 school year at Elementary School he already had a Behavioral Support Plan ("Behavioral Plan") from his Prior Elementary School and a prior IEP. This Behavioral Plan remained in place even when Student was not exhibiting some of the behaviors such as hitting teachers in Elementary School. This was appropriate as the variable nature of Student's behavioral as exemplified by his reinitiating of the previous hitting behavior at Private School.
5. While Student had behavioral issues at Elementary School, the combined use at Elementary School in 2011 to 2012 of the Behavioral Plan, Elementary School's positive behavior support plan, the redirection, rewards and positive behavioral enforcement and other strategies utilized at Elementary School, the modifications in the classroom such as the change from simultaneous dismissal of children to children being dismissed one at a time as well as the various tweaks that were done at Elementary School including the provision of almost daily communication between staff and Parents were sufficient to allow Student to substantially access educational benefit and the benefit of all related services at Elementary School. This translated to Student making meaningful educational gains, both as measured in his IEP and in general.
6. District is believed as to credibility concerning its report that the more egregious behaviors of severe tantruming, hitting teachers did not appear in any significant level at Elementary School and the more minor behaviors that were not all of the time that Student did exhibit were managed. That is not to say the hitting alone by Student or Parents was not occurring. It is just that District had insufficient access to information or tools to protect or know what occurred between Parent and Student at home. For example, Parents had Student in behavioral therapy at A.I DuPont the entire year, but did not share direct contact with A.I DuPont<sup>3</sup> by asking they attend an IEP or provide written information believing the attendance was not affordable or A.I. DuPont would or could not put anything in writing (which is not entirely accepted). Having said this, sharing of this information may

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<sup>3</sup> It is not suggested that these were required of parent. It is merely suggested that the staff at Elementary School knew what they saw and had to respond to what they saw and when information is not shared cannot be held to the standard of knowing that which is missing.

not have been a “cure all”. For example, Mother indicated she was getting nothing out of the behavioral therapy at A.I DuPont in August, 2012 citing that as a reason for its discontinuance even at once referring to the therapists in what appeared to two (2) of the Panel Members in a denigrating fashion that therapy was taught by non parents and insinuating an inability for non parents to possess adequate knowledge.

7. The testimony of District Staff as to the origination of the recommendation that Student be retained in Kindergarten is believed. Similarly, District reason why that was recommended in April 26, 2012 IEP meeting (Mother expressing a desire due to Student’s small stature and immaturity) as to retention (whether or not she intended to) is accepted that the email, District Teacher emailed the function of her acting as an advocate for Mother. This was not the wrong per se. A parent is an integral part of the team. The parents in this case throughout Student’s education have been actively involved. It was correct not to ignore this request to retain. District Teacher’s actions in going the extra mile in this instance were a part of the same devotion that led to her willingness to do an almost daily log. That is not to say that had she advocated an action harmful to Student’s education that would have been tolerable. It is simply that District correctly testified that as Student had an IEP, the driving force in the education of Student was the IEP not grade level. This is a different situation than a general education student with no requirement for the District to make accommodations.
8. District’s recommended change to promote Student to specialized support 1<sup>st</sup> grade at Other District Elementary School in the June, 2012 IEP meeting was appropriate in light of the addition of post April, 2012 IEP meeting data showing meaningful educational gains consistent with Student’s abilities and challenges combined with the retraction of Parents strong request that Student be retained. Under Student’s IEP, the Other District Elementary School has to modify the general educational materials in first grade to make them accessible so that Student could gain meaningful educational benefit from them. It is not found that this was impossible.
9. Student had made meaningful progress towards his IEP goals at the time that Parents withdrew him from District.
10. Where there were differences between Parents’ and District’s version of the same events, the greater credibility has been found for District’s. It is not believed that Parents are lying. It is simply that their recollection has been found to be effected by a natural bias. They love their child dearly making every effort to provide him the best, even when it taxes them physically, financially and emotionally. For example, Father thought a report from A.I. DuPont recommended more therapy sessions than it did. When he testified in this manner, it is not believed that Father was purposely trying to mislead the panel. Rather Father believed it, a belief that was influence by emotion. On that same note, it is believed that as soon as Mother heard as to the origination of an idea at the April 26, 2012 meeting was her rather than District Teacher she “shut down” not seeing the similarities between her relays of what she was told

District Teacher occurred at Private School to that which District Teacher advocated. Mother nonverbally communicated her disdain for district personnel throughout these proceedings as well as the behavioral therapists at A. I. DuPont. It is presumed she did not do so purposely and knew this behavior was not helpful, it simply could not be contained and a result of frustration.

11. While reviewed carefully, Dr. K.'s credibility was impaired by her one day of testing a young Student with impaired attentiveness not even taking into account that Student had been out of District for over 2 months, had just finished a Summer Program for pre-k skills at Private School and had just enrolled in a daycare type facility that Mother described as a disaster for Student's behavior. Moreover, her belief that Student was in 1<sup>st</sup> grade at Private School, an ungraded facility impairs the credibility of the information she has. When you couple this with her not viewing classrooms in District and other lack of collateral information, this leads to a conclusion not to attribute a great deal of weight to her relay of the possibility that Student suffered from educational deprivation while at Elementary School as well as the other possibility offered by Dr. K., the progressive worsening of Student's organic brain disability.
12. Typical Kindergartners are learning behavior and in doing so misbehave at times. As children age, it is expected they learn and naturally misbehaviors stick out more. However, at the time, District had Student he was at kindergarten age and this case is limited to the information District had as of 2011-2012. Because of the unknown quantity of the future, this does not limit or preclude Parents from reapplying for relief for a different set of facts in the future.

April 8, 2013  
Date

/s/Dr. Harold Tariff  
Dr. Harold Tarriff

April 8, 2013  
Date

/s/Gary R. Spritz  
Gary R. Spritz, Esq.

#### **IV. MAJORITY'S RATIONALE FOR DECISION**

##### **A. DISTRICT HAS MET BURDEN OF PROOF SHOWING THAT IT OFFERED STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION ("FAPE") IN 2011-2012**

District has the burden to establish that it offered Student a Free and Appropriate Public Education ("FAPE") in 2011-2012. What District did for Student (and Parents) was both procedurally and substantively adequate.

A student receives FAPE where procedures in Student's IDEA and the educational program offered are reasonably calculated to enable the student to receive educational benefits. Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 206-207 (1981) ("Rowley"). An educational benefit must be meaningful and provide the "basic floor of opportunity or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The education benefit must be "more than a trivial educational benefit." Coale v. State Dep't of Educ., 162 F. Supp.2d 316, 324 (D. Del. 2001) (quoting Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3d Cir. 1999) at 247-248).

To prevail for reimbursement since Parents unilaterally placed student, Parents had to prove that the District's placement violated the IDEA. T.R. ex rel. N.R. v. Kingwood Twp. Bd. Of Educ. 205 F.3d 572, 582 (3d Cir. 2000). Due to District's stipulation, the additional condition that the private school was appropriate was not at issue. Nor were the equities a determinative factor.

At the time, Parents removed Student from the District, the proposed placement at the June, 2012 IEP meeting was a first grade specialized support classroom at the Other District Elementary School. The Panel by split majority vote finds that District has proven that Student was provided meaningful educational and related speech, behavioral, occupational and other service such that Student had access to a significant educational benefit. The requirement of a C setting guaranteed that in the 2012-2013 school year had Student remained in District, Student would remain in a regular general education classroom less than 40% of the time. This ensured the sort of classroom Student would be in would enjoy a low teacher to student ratio. For example, Director of Special Services testified that specialized support classrooms never had more than 12 students and in the present case, 1<sup>st</sup> grade at the Other District Elementary School (where Student would have been placed had he not left the District) had two 1<sup>st</sup> graders and six kindergartners (8 students) paired with 1 teacher and a paraprofessional. This compares favorably to what Student receives at Private School. This is a small setting. Similarly, the services (speech, occupational therapy, etc... were what Student needed and had resulted in meaningful educational gains that Student had made toward in his goals in Student's Individualized Educational Plan in the 2011-2012 school year. It is not a failure in that Student had not mastered all of his goals as these were annual goals and the IEP year was not finished. What is significant is that Student's educational achievement is moving towards these goals. There is no dispute Parents were informed this just prior to their removal of Student at the June, 2012 IEP meeting.

While District does not claim perfect behavior on part of Student, it claims manageable behavior such as to allow Student to access education commensurate to Student's unique abilities. While Student's Behavioral Plan is not perfect (for example Director of Special Services suggested the addition of modification such as allowing one student at a time dismissal as being better), it is enough that it is reasonable. Parents' argument that modifications were necessary discounts the possible negative effect of micromanagement in light of variability of Student's behavior and regressions. For example, District did not remove the strategies for tantrums despite Student's relative tantrum free behavior and not hitting teachers at school. That may seem contradictory, but it is not as it permits for the possibility of regression when Student started another school. Hindsight bears this out. What happened when student started another school, Private School, he has hit his teacher much more than once. If you are to believe his teacher, he was hitting her 3 to 4 times a day. Moreover, District's witnesses described Student's behavior as variable. Would not it make sense then to have a Behavioral Plan that was sufficiently broad as to proscribe for the possibility of regression?

Now Parents mistakenly rely on a case G.D. v. Wissahickon Sch. Dst., 2011 U.S. Dist. LEXIS 63545 at \*30 (E.D. Pa. June 14, 2011) which is clearly factually distinguishable. Unfortunately, there is a significant difference in the ceilings between the children in the two cases, The pupil Jack in the G.D. v. Wissahickon Sch. Dst case had a verbal IQ of 143; Student's is much lower and perhaps more critically, there is an established wild card in this case, the lack of understanding of progression and effect of Student's organic brain abnormalities and thirdly there is no question as Student being found in need for services in this case. District has never contended that at this hearing. The functional behavioral assessment absent in Jack's case in G.D. v. Wissahickon Sch. Dst., 2011 U.S. Dist. LEXIS 63545 at \*30 (E.D. Pa. June 14, 2011) is present in this one. There is no evidence that Student's behavior is ignored in light of performance. It was discussed at the IEP meetings in 2011 and 2012 at Elementary School and throughout the school year at Elementary School.

Having said that, there is a flip side that District needs to consider, while it has some knowledge as of the last day of hearing on 3/6/13 what behaviors Student was exhibiting from a non related person, his teacher at Private School, as time passes, District's knowledge base as to Student wanes. Accordingly, as time passes it becomes more, not less likely, a new functional behavioral assessment may be necessary should Parents decide to reenroll Student. Having said this, this decision reviews the decisions District made in the 2011-2012 school year not those in some future time when the facts have not developed.

## **B. DISTRICT IS NOT LIABLE FOR COMPENSATORY EDUCATION**

District in the 2011-2013 school year with its IEPs in place at that time was providing Student and appropriate education and as such, no compensatory fund is due. The District should be aware though this was close and while in the final analysis the Behavioral Plan was found sufficient, great care should be taken with this Student if Student reenters the District. In its final analysis, District is held to no greater standard than the Behavioral Therapists at A.I. DuPont that Mother discontinued in August, 2012

or the physicians who cannot predict how Student's Organic Brain abnormalities will manifest in behavior, seizures and learning abilities. District is being held to know only what it reasonably can know. Additionally, while the behavioral comparison with kindergartners may not be distinguishable here such as to justify not emphasizing minor incidents of bad behavior, it may not apply in the future as Student ages. Again, that is why if Student reenters District, this decision will not preclude relief from what District does or does not do at that point. This is not before this tribunal.

Lastly, District may want to consider that if the lack of a divergence of a kindergartner's misbehavior does not put District on notice as to an issue of an addressable need, what effect if any does this have on general limitations period of two years?

### **C. THE IEP WAS SUFFICIENT AS TO GOALS WITH REGARD TO BEHAVIOR FOR STUDENT**

Student presents with variable behavior, from hindsight, regression occurs. The misbehaviors changes are intermittent and yet through the use of the programs at Elementary School, the IEP, the Behavioral Plans and the services, Student was managed so as to progress towards his educational goals. This is despite the unknown quantity as to the effect of Student's Organic Brain Abnormality. While the dissenting panel member sees this as an issue, the majority does not. In such a vague situation as Student, when you apply too narrow a focus, your risk of missing the target increases. While ideally targets and behavioral therapists may work in some situations, the evidence is that one years of Behavior Management left Mother with the conclusion that it had negligible benefit. This leaves the majority with the conclusion that in some cases such as this a broad Behavioral Plan such as this one applied with common sense cannot be said to be so vague as to deny FAPE. That is goals for the sake of goals and targets for the sake of targets do not meaningfully allow Student in this case to access any more education. We wish it were that simple. Now that is not to say again that this will always be the case. This is simply the opinion as of June, 2012.

Having said this, it is troubling that a physical therapist for example never read the Behavioral Plan. This should not be allowed to reoccur. However, that did not translate to Student not benefiting from Physical Therapy as it seems that the Physical Therapist by fortuitous accident was employing the appropriate behavioral strategies in the Behavioral Plan and Student did make meaningful progress as he did in Occupational Therapy. Nor did this prevent Student from obtaining FAPE or effect the decision making process. Parents did not sleep on their rights because of the Physical Therapist, it did not effect their decision to remove Student or delay filing this action. It is *de minimus*.

As to the alleged provision of the Procedural Safeguards and Father's statement that he may have if he had them he may have requested an independent educational evaluation. It is believed that Parents were provided them or access to them as set forth by the Educational Diagnostician's testimony.

Lastly, the dissenting panel member disagreed for reasons set forth in the dissent.

**D. STUDENT MADE MEANINGFUL EDUCATIONAL PROGRESS  
AT ELEMENTARY SCHOOL**

District Teacher testified at length as to the academic progress made by Student. Measured against what appears as Student's aptitudes, the benefit is significant. Now this was not accepted by the Dissenting Panel Member, but was by the majority. Similarly as the Speech Therapist, the Occupational Therapist, the Physical Therapist all testified to benefits Student had received from their services. The dissenting panel member disagreed for reasons set forth in the dissent.

**V. MAJORITY'S ORDER**

1. Parents'/ Student's requests for relief in their Complaint for Due Process violation are all denied as it is found that District both during the 2011-2012 school years at Elementary School provided FAPE to Student and their IEP of June, 2012 was reasonably calculated to lead to meaningful educational benefit.

2. This is a majority decision signed by the Panel Member's below and acts as the final decision of this case.

3. **This is a final decision subject to appeal by any aggrieved party within ninety (90) days in the federal court or the Delaware Family Court.**

So Ordered,

/s/ Gary R. Spritz  
Gary R. Spritz, Esq.

/s/Dr. Harold Tarriff  
Dr. Harold Tarriff

Dated: April 8, 2013

## **VI. DISSENT**

### **A. DISSENT'S FINDINGS OF FACT**

1. Student's Behavioral Support Plan was developed at the IEP Revision Meeting on 5/13/2011 by the IEP team at Elementary School and remained in place for the entire 2011-2012 school year at Elementary School despite Parent's requests for modification.
2. The Behavioral Support Plan remained in place even after Student's behaviors escalated beyond what had occurred at Elementary School. He no longer exhibited some of the Target Behaviors identified such as Tantrum Behaviors but had moved beyond entirely to Aggressive Behaviors which included name calling, kicking and hitting. The Behavior Support Plan was no longer appropriate and a second Functional Behavior Assessment should have occurred at this time by the District Psychologist at Elementary School and the Behavioral Support Plan modified.
3. Being as the Behavioral Support Plan was not revised, the existing Plan no longer contained an accurate, specific, and global hypothesis; there was no data collection by the District to monitor the Student's progress and effectiveness of the antecedent modifications, alternative response skills that were to be taught, reinforcement strategies and consequences. Therefore, this Behavioral Support Plan was not an effective support to ensure Student's educational benefit and access and appropriate education.
4. The ineffectiveness of the Behavioral Support Plan was compounded when neither the OT nor PT at Elementary School had received copies but also the fact that neither were even aware of its existence in the first place. Even more egregious is the fact that Student's Problem Behaviors occurring during OT and PT sessions were first documented as having occurred during OT and PT sessions at Elementary School.
5. As there is no documentation of data collection for the majority of the Student's IEP goals, the progress and mastery of goals were not objectively measurable.
6. Student's negative interactions with peers as well as staff were documented as neither a concern which directly interferes with his ability to learn yet there were no IEP goals written nor services given to address Student's need for specific social skills instruction. These negative interactions increased over the school year yet still no revision of the IEP took place nor did the School Psychologist even observe Student at any time.

7. Innumerable procedural violations occurred throughout Student's career, not limited to:
  - a. Insufficient presence of key IEP Team members during IEP meetings in which goals related to that Team Member's area of the curriculum or related service are being modified. For example, Dual-Certified General and Special Education Teacher should not be dual representative acting as both Regular Education Teacher as well as Special Education Teacher of the child while discussing and/or modifying IEP goals.
  - b. Predetermination of amount of Related Services Student will receive even before evaluation, record review and IEP meeting had taken place.
  - c. Insufficient distribution of Behavioral Plan document.
8. It cannot be proven that the Student had made meaningful progress toward his IEP goals at the time in which the Parents withdrew the Student from the District due to the subjective nature and lack of data collection on the IEP goals.
9. Dr. K.'s credibility is not in question and test results are viewed as a valid interpretation of the Student's ability and present level of educational performance which leads to the conclusion that the Student suffered educational deprivation while attending Elementary School.

## **B. DISSENT'S RATIONALE**

### **1. District Has Not Met Burden of Proof Showing that it Offered Student a Free and Appropriate Public Education in 2011-2012**

-The Behavioral Plan's failure caused a deprivation of educational benefit.

-The IEP's from both November, 2011 and June, 2012 have failed to provide a FAPE due to the lack of specific and objectively measurable goals, not addressing all of the Student's educational and related service needs within either of the IEPs, all of which caused a deprivation of meaningful educational benefit.

-The June 2012 IEP is a failure for the same reasons; it constructively did not offer the possibility meaningful educational benefit for the student for the 2012-2013 school year.

The Supreme Court has indicated that "*the Primary vehicle to provide a FAPE is the IEP.*" 34 C.F.R. §300.513(a) (2).

### **2. District Is Liable for Compensatory Education**

-District did not have an IEP in place that would provide the student with a FAPE and therefore is required to provide compensatory education.

According to the 3<sup>rd</sup> Circuit: *A school district that knows or should know that a child has an inappropriate IEP...Must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation.* M.C. v. Cent. Sch. Dist., 81 F.3d 389, 397 (3d. Cir. 1996).

**C. DISSENT'S PROPOSED ORDER**

COMPENSATORY EDUCATION:

Due to the failure of the District to provide the Student with FAPE the following is ordered:

A. Reimbursement for the 2011-2012 school year at Private School including ESY and Transportation Costs.

B. Education Fund to pay for the 2012-2013 school year at Private School including ESY and Transportation Costs

C. Compensatory Social Skills Classes to be delivered in a systematic, multi-sensory program such as Social Thinking or Collage equivalent to 1 session per week for the 2011-2012 school year.

D. Compensatory Social Skills training for the Parents.

E. Reimbursement for independent evaluation, expert fees, and additionally Parent's attorney fees associated with this hearing would have been ordered if attorney's fees had been in this Panel Member's jurisdiction.

April 8 2013

Date

/s/ Matthew Stankis

Matthew Stankis, Dissenting Panel Member

GRS/hs

Encl.

cc: Mary Ann Mieczkowski,  
mailed and emailed: 4/8/13