

BEFORE THE SPECIAL EDUCATION DUE PROCESS HEARING PANEL
DUE PROCESS HEARING FOR THE BRANDYWINE SCHOOL DISTRICT

IN RE THE MATTER OF:)
) DE DP 07-17
[STUDENT])

DECISION

The Due Process hearing for [STUDENT] was heard by the Independent Hearing Panel consisting of the following individuals: (a) Janell S. Ostroski, Esquire, Chair; (b) Stephen Hailey, educator; and (c) John Werner, lay person. The original complaint was filed with the Department of Education (herein "DOE") on or about January 13, 2007. The District requested that the DOE be joined as a party on January 26, 2007. The DOE agreed to join as a party.

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

For Brandywine School District:

Ellen Marie Cooper, Esquire
Brandywine School District
1000 Pennsylvania Ave
Claymont DE 19703-1237

For Student:

Patricia M. O'Neill, Esq.
Law Offices of Patricia M. O'Neill, P.A.
22 West Front St.
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For the Department of Education:

Jennifer Kline, Esquire
Department of Justice
102 West Water St.
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REFERENCES AND DEFINITIONS

Throughout this decision the following references and definitions will be used:

1. For confidentiality reasons, [PARENTS] will be referred to as Mother and Father and collectively and individually as the “parents”. In some instances, for example, only one parent may have attended a meeting but this decision may still refer to the parents in the plural. Actions and decisions of either parent were considered to represent the position of both parents. Therefore, the singular and plural use of this word is not critical.
2. For confidentiality reasons, [STUDENT] will be referred to as “[STUDENT]”.
3. Brandywine School District will be referred to the “District”.
4. Exhibits will be referred to as Dist. Ex. 1. (District Exhibit 1, 2, etc.)
5. References to the hearing transcript will be cited as “(date of hearing) TR at (page number); ln (line numbers)”, e.g., 3/22 TR at 23; ln 1-3. The page referred to is the internal page of the Transcript, not the number on the bottom of the page. If several pages are referenced (i.e. TR at 3-7), the first number listed for line numbers will be the corresponding number on the first page referenced and the last number listed for the line number will be the corresponding number on the last page listed. (i.e. 3/01 TR at 3-7, ln 2-22 would refer to line 2 on page 3 through line 22 on page 7).
6. Witnesses – after identifying the witnesses they will be thereafter referred to by last name.
7. Free Appropriate Public Education will be referred to as “FAPE”.
8. Individual Education Plan will be referred to as “IEP”.
9. The State of Delaware Department of Education will be referred to as “DOE”.
10. The Delaware Student Testing Program will be referred to as “DSTP”.

EXHIBITS

The Exhibits of the Brandywine School District were admitted without objection.

There were no Exhibits submitted on behalf of the student.

SUMMARY OF ISSUES

1. Did the Brandywine School District violate the IDEIA and Chapter 31 of Title 14 of the Delaware Code by not identifying [STUDENT] as a student with a disability entitling him to special education and related services as a fifth grade student at [Elementary School]?
2. If the Brandywine School District violated the IDEIA and Chapter 31 of Title 14 of the Delaware Code, what is the appropriate remedy for the violation?

STATEMENT OF THE POSITIONS OF THE PARTIES

Brandywine School District

The District asserts that it did not violate the IDEIA and Chapter 31 of Title 14 of the Delaware Code by failing to identify [STUDENT] as a child with a disability in need of an IEP as [STUDENT] was not a child with a disability. It further asserts that as there was no violation, there is no need for a remedy.

Parents

The parents assert that the District violated the IDEIA and Chapter 31 of Title 14 of the Delaware Code by failing to identify [STUDENT] as a child with a disability in need of an IEP and that the appropriate remedy is for the District to reimburse the parents for private school

tuition, specifically the [“private school”].

FINDINGS OF FACT

1. [STUDENT], age ten, was a student in the Brandywine School District (“the District”) from September, 2001, until early January, 2007. Dist Exs. 5, 27, 38, 51, 62 & 86. [STUDENT] attended [one Elementary School in the district] for Kindergarten through 3rd grade¹, and [another Elementary School in the District] for 4th grade and 5th grade². Dist. Exs. 5, 27, 38, 51, 62 & 86.
2. In January, 2007, xxx (“Mother”) and xxx (“Father”, collectively “Parents”) brought an action for Due Process against the District alleging that [STUDENT] has disabilities which impact his ability to learn to read, write, and do math³. 4/02 TR at 22-23; ln 26-1; 4/02 TR at 29; ln 15-19; 5/14 TR at 23; ln 17-19.
3. [STUDENT] first exhibited difficulties⁴ in Reading in the 1st grade with decoding, and was reading below grade level. Dist. Exs. 7-9, 18, 20 & 27. He exhibited no other academic difficulties in 1st grade. Dist. Ex. 27. He received two “Cs” in Reading, a “C” and a “B” in English Language Arts (“Writing”), and two “Cs” in Math. Dist. Ex. 27.
4. Parents requested an evaluation for [STUDENT] in the middle of 1st grade. An IEP Team determined that [STUDENT] was not eligible for

1 The 2001-2002, 2002-2003, 2003-2004, and 2004-2005 school years.

2 The 2005-2006 and 2006-2007 school years.

3 Mother testified that she was not concerned about Math, however Father testified that Math was a problem.

4 [STUDENT] had an IEP for 3 months for Speech & Language therapy in Kindergarten. Dist. Exs. 3-7.

special education and related services. Dist. Exs. 11-14.

5. [STUDENT]'s 1st grade teacher recommended retention due to his reading difficulties. However, upon Mother's request, [STUDENT] was administratively promoted to the 2nd grade. Dist. Ex. 27; 3/28 TR at 115-116; ln 17-22.
6. [STUDENT] was diagnosed with ADHD between 1st and 2nd grade. Mother testified that the 504 Plan adequately addressed his ADHD and was not the reason for seeking special education and related services. 4/02 TR at 174; ln 7-16. Dist. Exs. 16, 26, 32 & 33.
7. Mother testified that she had tried different medications for ADHD but was reluctant to use ADHD medications because of a family medical history. [STUDENT] is not currently being medically treated for his ADHD. 4/2 TR at 163-164; ln 10-21 and at 169-173; ln 4-16.
8. In 2nd grade, [STUDENT] continued to have difficulty with decoding, and began to have difficulty with Writing. Dist. Exs. 37 & 38. He was reading below grade level. However he was on grade level in Writing and Math. Dist. Exs. 37 & 38. [STUDENT] received three "Cs" in Reading; a "C", a "D", and a "C" in Writing; and a "C" and two "Ds" in Math. Dist. Ex. 38.
9. [STUDENT] received a "Progress Warning" in Reading and a "Satisfactory Progress" in Math in the 2nd grade DSTP. Dist. Exs. 36 & 65.
10. [STUDENT] was promoted to the 3rd grade. Dist. Ex. 38.

11. At the beginning of 3rd grade, [STUDENT] continued to have difficulties with decoding in Reading and also with Writing. 3/01 TR at 73-74; ln 22-13; 3/01 TR at 153; ln 4-7. For the first two marking periods, [STUDENT] was reading below grade level, however he was on grade level in Writing and Math for all three marking periods. Dist. Ex. 51. By the end of 3rd grade, [STUDENT] was progressing on all measures of Reading and was reading on grade level. Dist. Ex. 51; 3/01 TR at 75-76; ln 22-8. He received three “Cs” in Reading; one “D” and two “Cs” in Writing; and two “Cs” and an “A” in Math. Dist. Ex. 51.
12. [STUDENT] met state standards, scoring “3s” in Reading, Writing, and Math on the 3rd grade DSTP. Dist. Exs. 46 & 65.
13. [STUDENT] was promoted to the 4th grade. Dist. Ex. 51.
14. [STUDENT] continued to have difficulty with Reading in 4th and 5th grades. However, his difficulty was no longer with decoding, but was with oral fluency and reading comprehension. Dist. Exs. 56, 57, 59 & 68; 3/02 TR at 159; ln 2-3; 3/02 TR at 161-162; ln 17-18; 3/02 TR at 167; ln 15-22; 3/22 TR at 132.; ln 3-12; 3/27 TR at 136; ln 15-18. He was on grade level in Reading, Writing, and Math, and received one “B” and three “Cs” in Reading, three “As” and a “C” in Math, and one “B” and three “As” in Writing in the 4th grade. Dist. Ex. 62. At the end of 4th grade, it was determined that [STUDENT] was more fluent on fiction texts than non-fiction texts and was approaching the 4th grade benchmark in fluency on fiction texts as measured by the Dynamic Indicators of Basic Early

Literacy (“DIBLES”). Dist. Ex 60; 3/02 TR at 172; ln 9-18.

15. [STUDENT] scored below state standards (“2”) on Writing, and well below state standards (“1”) in Reading and Math on the 4th grade DSTP administered in March, 2006. Dist Exs. 58 & 65.
16. Dr. Julie Schmidt, Supervisor of Accountability for the District, testified that you would not expect a child who gets a PL-3 on the DSTP one year to get a PI-1 the next year because a child does not lose skills he has previously learned. She further testified that the Individual Student DSTP Profile indicated that [STUDENT] did not answer any of the reading questions on the DSTP in the 4th grade and that this indicated a motivation problem with the test taking in 4th grade. Dist. Ex. 65; 3/27 TR at 12 ln 6. She also testified that it typically takes a child two to two and half hours to complete the tests. 3/27 TR at 14; ln 18.
17. Marilyn Baker testified that she administered the 4th grade DSTP to [STUDENT] and that she offered him his 504 Accommodations during the test, he stopped working on each test after thirty minutes, and he refused to check his work when prompted to do so. 3/27 TR at 54; ln 21, at 57; ln 18, and at 58; ln 8.
18. [STUDENT] was promoted to the 5th grade. Dist. Ex. 62.
19. In 5th grade, [STUDENT] continued to have problems with oral fluency and comprehension. Dist. Ex 80; 3/22 TR at 24; ln 17-18. [STUDENT] received a “C” in Reading, a “D” in Math, a “D” in Writing, a “C” in Science, and a “C” in Spelling in the first marking period of 5th grade.

Dist. Ex. 86. However, he was making progress in all classes. Dist. Ex. 86; 3/27 TR AT 95;; LN 2-5; 3/27 TR at 110; ln 1.

20. The Measure of Academic Progress (“MAP”) is administered to students in grades 4 through 10, in the Fall, Winter, and Spring of each school year. 3/23 TR at 113; ln 3-9. The MAP assessment allows the educators to identify areas of strengths and difficulties so that teachers can tailor their instruction in the classroom to help meet the areas of difficulty while continuing to grow students in the areas where they are already showing some success. 3/23 TR at 111; ln 2.
21. On the MAP given to [STUDENT] in October of 5th grade, [STUDENT] received 197 on the math MAP assessment, one point below a score predictive of a “3” on the 5th grade DSTP. Dist. Ex. 97; 3/23 TR at 123; ln 4-13. [STUDENT] scored a 183 on the reading MAP assessment, predictive of a “2” on 5th grade DSTP and right where they would expect a 5th grader to be at the beginning of 5th grade, ready to learn 5th grade material. Dist. Ex. 97; 3/23 TR at 127-128; ln 9-12. The teachers testified that the MAP data matched the teacher’s judgments concerning instructional level in Reading and Math for [STUDENT]. 3/27 TR at 16-17; ln 15-1.
22. On the MAP given to [STUDENT] in January of 5th grade, [STUDENT] scored a 206 on the reading assessment, predictive of a “3” on the 5th, 6th, and 7th grade DSTP in Reading and was ready for instruction at the 7th grade level in Reading. Dist. Ex. 97; 3/23 TR at 133; ln 9-16; 3/23 TR at

134; ln 5-7.

23. In 5th grade, [STUDENT] had test and quiz scores that were as high as 80, 90, and 95. Mother could not explain why he could do so well if he had a disability. 4/2 TR at 173-176; ln 17-11. Dist. Exs. 89, 90, and 91.
24. [STUDENT] was withdrawn from [Elementary School in the District] in January, 2007. Dist. Ex. 95
25. Throughout his tenure in the District, [STUDENT]’s teachers employed the following instructional methods in the classroom: (1) differentiated instruction, (2) direct instruction, (3) CRISS⁵ strategies, (4) story frames, (5) picture drawing strategies, (6) strategy instruction, and (7) a multi-sensory approach to instruction. 3/27 TR at 92; 7-18; 3/27 TR at 91-93; ln 1-22; 3/28 TR at 81-82; ln 19-1.
26. He also received the following interventions (1) additional reading instruction in a small group from a Title I reading Para educator from the 1st to the 5th grades; (2) private tutoring from Reading Assist, Inc. at home in the summer between 1st and 2nd grades; (3) reading tutoring at school from a Project Reading Assist volunteer in 2nd and 3rd grade; (4) one-on-one tutoring for writing at home; (5) assistance from the Instructional Support Team (“IST”) in 4th grade for oral fluency and reading comprehension; (6) a 504 Plan for 2nd through 5th grades, (7) Individual Improvement Plans for Reading and Math due to his scores on the DSTP in 4th grade; and (7) After School Academy for Reading in 4th grade and in

- Math for 5th grade. Dist. Exs. 16,24,25, 31-33, 39, 54, 56, 57, 59, 84, 87, 88 & 96; 3/02 TR at 165; ln 1-5; 3/22 TR at 166-167; ln 2-9; 3/27 TR at 88-89; ln 19-1; 3/28 TR at 115-116; ln 17-22; 4/02 TR at 16; ln 18-21.
27. Although [STUDENT] had been diagnosed with ADHD, he exhibited no inappropriate behaviors in the classroom in any grade. 3/01 TR at 72-73; ln 10-14; 3/01 TR at 172; ln 4-13; . 3/01 TR at 101; ln 12-17; 3/01 TR at 173-174; ln 16-7; 3/02 TR at 68; ln 1-10; 3/23 TR at 76; ln 17-20; 3/27 TR at 79-80; ln 9-17.
28. He did exhibit attention problems and would sometimes need to be refocused and re-directed to stay on task. Dist. Exs. 72, 81 & 82.
29. In 3rd grade, [STUDENT]'s 504 Plan was revised to include additional accommodations in Math for computations and visual perceptions. Dist. Exs. 39 & 54. In 5th grade, [STUDENT]'s 504 Plan was revised for additional accommodations for visual perception issues and task completion. Dist. Exs. 84 & 96.
30. [STUDENT] was evaluated for special education and related services in 3rd and 5th grade. Dist. Exs. 42, 47, 49, 50, 66, 71, 72-74 & 76-82. For both evaluations, [STUDENT] was evaluated under the categories for a specific learning disability and the discrepancy model was used. Dist. Exs. 49, 50, 72, 81 & 82. The criteria for a "specific learning disability" pursuant to Delaware regulations were used to determine whether [STUDENT] had a specific learning disability. 3/22 TR at 183; ln 3-9.

31. In February of 3rd grade, Mother wrote to Peter Barry (“Barry”), [Elementary School] Principal, and Allison King, then a Special Education Teacher and Educational Diagnostician at [Elementary School] (Dist. Ex. 104; 3/02 TR at 64; ln 20-22), requesting [STUDENT] be evaluated for special education and related services. Dist. Ex. 42. Mother gave permission to evaluate. Dist. Ex. 43; 3/02 TR at 64; ln 10-13.
32. On or before May 20, 2005, [STUDENT] completed a WIAT-II (“the 3rd grade WIAT”) administered by King, and the WISC-IV administered by Dr. Miriam Indenbaum (“Indenbaum”). Dist. Ex. 49. [STUDENT] scored within the average range on all subtests of the WISC-IV, with a Full Scale IQ of 91. Dist. Exs. 49 & 50. [STUDENT] also scored in the average range on all measures of Reading, Writing and Math on the 3rd grade WIAT. Dist. Exs. 49 & 50; 3/02 TR at 113;ln 6-7.
33. A team, consisting of Parents, King, Barry, Indenbaum, and Laura Becker, [Elementary School] counselor, (collectively “the 3rd grade Team”) met on May 25, 2005, and determined that [STUDENT] was not eligible for special education and related services because there was not a severe discrepancy between [STUDENT]’s ability and his achievement. Dist. Exs. 49 & 50. Parents agreed with the determination. Dist. Ex. 50; 3/02 TR at 116; ln 20; 3/02 TR at 116-117; ln 21-1.
34. In 4th grade, [STUDENT] was recommended for the Instructional Support Team (“IST”). The IST team did not refer [STUDENT] for an evaluation for special education services at the end of 4th grade. 3/22 TR at 34; ln 11-

- 13.
35. In August, 2006, between 4th and 5th grade, Mother called [Elementary School] and asked that [STUDENT] be evaluated for special education and related services.
36. Sometime after September 8, 2006, and approximately one week after school began, Harrington received a copy of a psycho-educational evaluation (“IEE”) for [STUDENT] administered by Dr. Susan Moroz (“Moroz”) of Educational Services, Inc. (the “Moroz Report”). Dist. Ex. 66. Moroz, who administered the Woodcock-Johnson-III and other tests, diagnosed [STUDENT] with dyslexia and dysgraphia. Dist. Ex 66.
37. On September 18, 2006, a team consisting of Parents, Harrington, Cynthia Pawlikowski (a special education teacher), Betty Pinchin (xxx Principal), Heather Horne ([STUDENT]’s 5th grade Writing and Math teacher), and Phyllis Tallos (school psychologist) (collectively “the 5th grade Team”), met to discuss the Moroz Report. Dist. Ex. 66. The Moroz Report did not include a measure of General Intelligence (an IQ test). However, from the scores given on the subtests, Tallos determined [STUDENT] had an IQ in the low 90’s. 3/22 TR at 196; ln 5-26. This score was consistent with [STUDENT]’s IQ score reported by Indendbaum in May, 2005, which would have been [STUDENT]’s 3rd grade year. Dist. Ex. 49. The specific findings of each test and subtest of the Moroz Report were discussed at the September meeting. 3/02 TR at 184; ln 1-5.

38. The district members of the 5th grade Team did not find a severe discrepancy between [STUDENT]'s ability and achievement in the Moroz Report. Dist. Ex. 72. However, no decision on eligibility for special education and related services was made at that meeting. Instead, the 5th grade Team decided to do more assessments. Dist. Ex. 72. Parents actively participated in the meeting and provided an addendum to the meeting minutes of the meeting prepared by Harrington. Dist. Ex. 72.
39. On September 20, 2006, Mother provided written permission for [STUDENT] to be assessed for special education and related services by the 5th grade Team. Dist. Ex. 74.
40. A screening was conducted by the xxx school nurse on September 20, 2006, and ruled out vision or hearing difficulties. Dist. Ex. 73; 3/02 TR at 186-187; ln 20-13; 3/22 TR at 16; ln 12-16.
41. On October 2, 2006, [STUDENT] completed a WIAT-III ('the 5th grade WIAT') administered by Harrington. Dist. Ex. 76. All scores, except the Spelling score, on the 5th grade WIAT fell in the confidence interval reported by King on the 3rd grade WIAT. Dist. Exs. 49 & 76.
42. In addition to curriculum-based assessments for Reading and Writing done on October 3 and October 12, 2006, Independent Reading Inventories, conducted on October 12, 2006, indicated that [STUDENT] (1) was able to read 4th grade material independently; (2) was able to answer 4th grade comprehension questions independently; (3) was able to read 3rd and 4th grade sight words independently; (4) was able to read 5th grade material

independently; (5) was at the instructional/frustration level on 5th grade comprehension questions; and (6) was at the instructional level on 5th and 6th grade sight words. Dist. Exs. 76, 77, 79 & 80.

43. The 5th grade Team met on October 17, 2006, and, using the discrepancy model, determined that [STUDENT] was not a child with a disability eligible for special education and related services. When making its decision, the 5th grade Team discussed all assessments, including [STUDENT]'s DSTP scores from 4th grade, independent evaluations provided by the Parents, other information provided by Parents, and past evaluations by the District. 3/22 TR at 23-24; ln 19-1; 3/22 34 1-3; 3/22 TR at 46-47; ln 13-2; 3/22 TR at 180-181; ln 18-1; 3/22 TR at 192; ln 8-17. The District team members supported the determination, but Parents and their invitee disagreed with the determination. Dist. Exs. 81 & 82.
44. Parents withdrew [STUDENT] from the District in January, 2007.
45. By letter dated January 5, 2007, Ann Hilkert, Director of Special Programs and Services, responded to Parent's request for reimbursement, denying the request and asking Parents to participate in mediation to resolve their concerns. Dist. Ex. 95.
46. In January, 2007, Parents filed a Complaint for Due Process with the Department of Education alleging the District violated the IDEIA by not identifying [STUDENT] as a child with a disability entitled to special education and related services. Dist. Ex. 1.

- 47.** A panel was appointed and a pre-hearing teleconference was scheduled for January 30, 2007⁶, to discuss preliminary issues and to schedule the hearing date/s.
- 48.** By letter dated February 12, 2007, counsel for the Parents requested that two members of the panel recuse themselves from the panel. The request was denied. The specific reasons for both the request and the denial of the request can be found by reviewing counsel's letter of February 12, 2007, and the chair person's response letters dated February 22, 2007.
- 49.** A second teleconference was held on February 14, 2007, to discuss additional scheduling issues. Counsel for Parents did not appear for that teleconference. 2/14 TR.
- 50.** A third teleconference was held on February 16, 2007, and final dates for the hearing were set. At the request of the Parents, the hearing was scheduled for four hour blocks of time because Mother indicated she had a medical condition which prohibited her from sitting or standing for more than four hours at a time.⁷ 2/16 TR.
- 51.** The hearing on this matter was held over several days: March 1, 2, 22, 23, 27, 28, 2007, April 2 and 16, 2007, and May 10 and 14, 2007. In addition

⁶ Connie Williams was the original lay person on the panel. Mrs. Williams recused herself after discovering a conflict. John Werner was later appointed as the lay person on the panel and, therefore, was not present for the first teleconference.

⁷ Counsel for Parents asserts that the panel required evidence of the medical condition before granting the request. The panel requested a letter from a doctor verifying the condition. Parents obtained a letter that indicated that Mother needed shortened time frames for the hearing but did not explain her medical condition. The panel did not require any further documentation and granted the request. The panel did not find it necessary to make a determination as to whether Mother was in fact a person protected under the American's with Disabilities Act as they had granted Mother's request without additional information.

there were teleconferences with the panel and parties held on the following days: January 30, 2007⁸, February 14, 2007, February 16, 2007, April 20, 2007, and May 3, 2007.

- 52.** Five days before the start of the hearing, the District submitted its Exhibits and witness list.
- 53.** Parents submitted no documentary evidence. Parents submitted a witness list which included both parents, Heide Mizell, Dr. Sue Levine and the District's and DOE's witnesses.
- 54.** On February 26, 2007, counsel for the Parents sent an e-mail requesting that the entire panel recuse itself. The request was not properly made in accordance with the Due Process Technical Assistance Manual. Counsel was permitted to put her oral objection on the record on first day of the hearing. 3/1 TR. The request was denied.
- 55.** Parents objected to the original location of the hearing based on the distance from the Parents' home but suggested no alternatives. It appears the location was only 16 miles from the parents' home. 3/1 TR.
- 56.** At the conclusion of the second day of the hearing, the parents suggested different locations where the hearing could be held. The District offered to find a location in the District offices. The parents agreed. The remaining hearing dates were held in the administrative offices of the Brandywine School District. 3/2 TR at 188-196; ln 6-12.

⁸ A court reporter was not present for this first teleconference but a summary of the teleconference can be found in the chair person's letter dated January 30, 2007.

57. The District completed its case on March 28, 2007, and Parents began their portion of the case.
58. On April 2, 2007, the District asked for a proffer as to the testimony of Dr. Levine. 4/2 TR at 186; ln 14.
59. Counsel for Parents proffered that Dr. Levine would testify that [STUDENT] had dyslexia and dysgraphia, would discuss the psychological and psycho-educational testing results, and would explain that the [“private school”] was the appropriate placement for a child with this condition. 4/2 TR at 186; ln 14.
60. Counsel for the District and DOE objected to the portion of Dr. Levine’s testimony that would entail Dr. Levine diagnosing the child with dyslexia and dysgraphia and reviewing psychological and psycho-educational testing results as it would constitute the unauthorized practice of psychology pursuant to Title 24 Section 35 of the Delaware Code because Dr. Levine had a doctorate degree in education and did not have a doctorate degree in psychology nor was she a certified school psychologist. 4/2 TR at 189; ln 4.
61. The panel took the matter under advisement and subsequently issued a letter dated April 6, 2007, ruling that the panel would not exclude the testimony of Dr. Levine as this panel is not the appropriate authority to make the decision as to whether or not Dr. Levine was engaging in the unauthorized practice of psychology. However, counsel for the Parents was instructed to advise Dr. Levine that the issue had been raised and give

her the opportunity to consult with her own attorney and have an attorney present during the hearing if she so chose.

- 62.** On April 16, 2007, the panel and parties met to resume the hearing. Parents appeared and requested a continuance to evaluate how they should proceed because Dr. Levine was refusing to testify⁹. 4/16 TR at 6; ln 21.
- 63.** At the beginning of the hearing on April 16, 2007, counsel for the Parents indicated that she had sent an e-mail regarding the continuance request the Friday before. However, it was discovered that counsel used the wrong e-mail address for two of the three panel members, never sent the request in writing, and never followed up to confirm that the request received. 4/16 TR.
- 64.** The District and DOE did not object to the request for a continuance. 4/16 TR at 6-10; ln 2-22.
- 65.** As the Parents had not identified any other witnesses prior to the start of the hearing, there were no other witnesses the Parents could call except Father.
- 66.** The District and DOE agreed to waive their right to object to the Parents calling a witness whom they had not identified five days prior to the hearing to allow Parents the opportunity to explore the possibility of

⁹ At the beginning of the hearing, counsel for parents indicated that she had sent an e-mail regarding the continuance request the Friday before. However, it was discovered that counsel used the wrong e-mail address for two of the three panel members, never sent the request in writing and never followed up to confirm that the request was received.

finding a witness who would testify and support their position. 4/16 TR at 28-30; ln 17-20.

67. The District further agreed to provide Parents with a list of the experts to whom they refer parents for independent evaluations and indicated that they would not object to those individuals testifying. 4/16 TR at 35; ln 14 – 37 ln 11.
68. A teleconference was scheduled for April 20, 2007, to discuss the Parents' progress in locating a new witness. 4/16 TR at 33 ln 6.
69. At the teleconference, counsel for parents was not able to tell the parties and panel as to when the parents were going to be able to proceed and requested additional time. 4/20 TR at 18.
70. The continuance was granted. 4/20 TR.
71. Another teleconference was scheduled for April 27, 2007, with the understanding that the teleconference would be canceled if the Parents did not have more information about their witness by April 25, 2007. 4/20 TR at 10; ln 6.
72. The teleconference on April 27, 2007, was in fact canceled because Parents had not yet secured a witness to testify on their behalf. Another teleconference was scheduled for May 3, 2007.
73. On May 3, 2007, counsel for Parents advised the panel that her client had met with Dr. Finkelstein to discuss testifying on their behalf. The hearing was then scheduled to resume on May 10, 2007, to hear from the Parents' witness. 5/3 TR at 3; ln 10.

- 74.** On May 10, 2007, the Parents again requested a continuance indicating that it was a financial hardship for them to call their witness. 5/10 TR at 3; ln 11. The Parents requested an additional two weeks but could not give any reasonable assurances that two weeks would be adequate time to resolve all of the issues they had with obtaining a witness. Counsel for Parents could also not tell the panel whether the Parents would be calling Dr. Finkelstein or searching for yet another witness. 5/10 TR at 7-9; ln 15-12.
- 75.** The panel denied this request for a continuance and attempted to proceed with the rest of the hearing. 5/10 TR at 10; ln 11.
- 76.** However, the hearing could not continue at that time because the only other witness the Parents planned to call was Father and Father went to work that day instead of coming to the hearing. 5/10 TR at 11; ln 6.
- 77.** The hearing on that day concluded after approximately 45 minutes because Parents did not come prepared to present any witnesses.
- 78.** Arrangements were made for Father to testify by telephone on May 14, 2007, and the hearing was adjourned. 5/10 TR at 21 ln 6.
- 79.** The next day, counsel for Parents left a message for the chair person and sent an e-mail indicating that the parents now had the money to hire Dr. Finkelstein and wanted him to testify. 5/14 TR at 5; ln 17.
- 80.** At the time set for Father's telephonic testimony on May 14, 2007, counsel for the Parents renewed her request for a continuance and explained that Dr. Finkelstein was available to testify on the upcoming

Friday. 5/14 TR at 5; ln 17. Counsel for the District opposed any further continuances and advised that she was not available at that time. The DOE took no position. 5/14 TR at 6-12; ln 9-16.

- 81.** The panel denied this final request for a continuance. 5/14 TR at 13-14; ln 1-22.
- 82.** At the conclusion of Father's testimony, everyone agreed that closing arguments would be due twenty (20) days from the date the final transcript was received by the parties and that on the date the closing arguments were due, the parties would e-mail them to the panel and each other and put hard copies in the mail. 5/14 TR at 37; ln 8-19.
- 83.** By the chair person's letter of May 22, 2007, the parties were notified that closing arguments were due June 11, 2007, and counsel was reminded to send them by electronic mail and first class mail on that day.
- 84.** On June 11, 2007, the panel received the District's closing argument and the DOE's position supporting the District's closing argument. The hard copies later arrived in the mail again.
- 85.** On June 11, 2007, at 10:45 p.m., counsel for the Parents sent an e-mail indicating that "Attachment will be sent by mail". However, there was no attachment attached to the e-mail. This e-mail was not received by the chair person until another panel member forwarded it to her because counsel for Parents' used the wrong address.

- 86.** On June 13, 2007, the chair person sent a letter to the parties indicating that the panel had not received the Parents' closing argument by electronic mail or first class mail.
- 87.** On June 15, 2007, counsel for the Parents sent a copy of her June 11, 2007, e-mail to the chair person. The e-mail confirmed that the June 11, 2007, e-mail was sent to the chair person using the wrong address and that there was no attachment to the e-mail.
- 88.** On June 20, 2007, the chair person sent another e-mail to counsel for the Parents indicating that Parents' closing argument still had not been received by electronic mail or first class mail.
- 89.** On that same day, counsel for Parents sent an e-mail confirming that she never sent her closing argument by electronic mail. She failed to address the issue as to why the hard copy had never been received by the chair person.
- 90.** The chair person received the hard copy of the closing argument on June 22, 2007. It was post marked on June 12, 2007, with a second post mark dated June 19, 2007, adding more postage. The address was wrong.

DISCUSSION

1. Did the Brandywine School District violate the IDEIA and Chapter 31 of Title 14 of the Delaware Code by not identifying [STUDENT] as a student with a disability entitling him to FAPE through the development of an IEP and provision of related services as a fifth grade student at xxx Elementary School?

The District has the responsibility of identifying children who are in need of special

education services. 14 Del. C. Sec. 3122. The IDEA requires a local public school district to develop an Individualized Education Program (“IEP”) that is designed to ensure FAPE for every child identified as eligible for special education due to a disability,. *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). The Supreme Court has interpreted IDEA’s mandate to provide a FAPE to require the District to provide an education “tailored to the unique needs of a handicapped child by means of an ‘individual education program’ (“IEP”). *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The child’s program should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade; the education provided must be “sufficient to confer some educational benefit.” *Id.* at 176. Although there has been no specific definition of what is meant by “meaningful”, the Third Circuit Court of Appeals requires an “educational benefit” to be “more than a trivial benefit or *de minimis* educational benefit.” An IEP must confer “significant learning” and “meaningful educational benefit.” *Ridgewood v. Bd. of Educ.*, 172 F. 3d at 247; *Carlisle Area Sch. Dist.*, 62 F.3d at 533-534; *Oberti*, 995 F.2d 1204, *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171, 180 (3d Cir. 1988);

At the same time, there is no requirement the school district maximize the potential of a child. *Rowley*, 458 U.S. at 198. School districts are not obligated to provide a child with the best education, public or private, that money can buy. *Steinberg v. Weast*, 34 IDELR 113 (D. Md. 2001). Nor does the IDEA require a school district to maximize each child’s potential commensurate with the opportunities provided to other children. *Rowley*, 458 U.S. at 198.

Rather,

The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal education; it requires an adequate, rather than an optimal IEP. Appropriateness and adequacy are terms of

moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Rowley, 458 U.S. at 198. *Rowley* does not require the District to provide an optimal level of services, or even a level of services, which would confer additional benefits, because the IEP required by the IDEA represents only a "basic floor of opportunity." *Id.* at 176; *Carlisle*, 62 F.3d at 533. The Sixth Circuit analogized that the IDEA does not require the educational equivalent of a "Cadillac," but only requires the equivalent of a "serviceable Chevrolet." *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455, 459-460. The District has the burden of proving the IEP is appropriate but does not have to prove the inappropriateness of any alternative placement. *Carlisle*, 62 F.3d at 533. However, in order to be eligible for an IEP, a child must qualify for services as a child with a disability as defined by state law. 20 U.S.C.A. § 1414(d)(1)(A).

The Delaware Department of Education has issued the *Administrative Manual for Special Education Services* (revised December 15, 2004) ("*AMSES*"), as a means to satisfy the state's responsibilities under the IDEA. *AMSES* at Preface. Pursuant to *AMSES*, a "child with a disability" means:

[A] child evaluated in accordance with [the provisions of *AMSES*] as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment, including blindness, serious emotional disturbance..., an orthopedic impairment, autism, traumatic brain injury, an other health impairment, *a specific learning disability*, deaf-blindness, or multiple disabilities, *and who, by reason thereof, needs special education and related services.* (emphasis added.)

AMSES, at 25; *see also*, 20 U.S.C. § 1401(3)(A). In this case, the Parents presented the 5th grade

Team with a report from an outside source indicating that [STUDENT] had dyslexia and dysgraphia. Dist. Ex. 66. If in fact, the child has dyslexia or dysgraphia, he could have been identified as a child with a disability under the category of “specific learning disability “ AMSES at 20 & 37.

AMESES defines a specific learning disability as:

...[A] disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. *AMESES* at 37.

Pursuant to *AMESES*, an IEP team may determine that a child has a specific learning disability if:

- (1) The child does not achieve commensurate with his age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section if provided with learning experiences appropriate for the child’s age and ability levels; and
- (2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:
 - (i) Oral expression.
 - (ii) Listening comprehension.
 - (iii) Written expression.
 - (iv) Basic reading skill.
 - (v) Reading calculation.
 - (vi) Math calculation.
 - (vii) Math reasoning.

AMESES at 20.

AMESES sets forth the procedure a district must follow when determining whether a child is in need of special education and related services. *AMESES* at 14, Sec. 300.532. With respect to this case, it is important to note that *AMESES* requires a variety of assessment tools and

strategies be used to gather relevant functional and developmental information about the child *including* information provided by the parents and information related to enabling the children to be involved in and progress in the general curriculum. AMSES, Sec. 300.532(b). However, it is also important to note that AMSES mandates that no single procedure can be used as the sole criterion for determining whether a child is a child with a disability. AMSES, Sec 300.532(f).

The District comprised an appropriate team. Dist. Exs. 72 & 82; 3/02 TR at 183; ln 16-22. The team received written permission to evaluate the child. Dist. Ex. 74. The initial evaluation was completed within the time period required by *AMSES*. 3/22 TR at 36-39; ln 3-1. The team found that [STUDENT] was not a child in need of special education and related services. In making this decision, the team used a variety of assessments, considered the Parents' independent evaluation of Dr. Moroz, reviewed curriculum-based and other assessments given by members of the 5th grade Team who were not [STUDENT]'s teachers, listened to teacher observations, reviewed recent testing performed by the District (specifically, the 5th grade WIAT), and reviewed [STUDENT]'s 4th grade DSTP scores. Dist. Exs. 72, 77, 79-83; 3/02 TR at 184; ln 1-5 & 15-16; 3/22; 3/22 TR at 42;ln 6-13; 3/22 TR at 185; ln 4-7.

The 5th grade Team used the criteria under Section 4.8 of *AMSES*. In particular, they used the severe discrepancy model to determine whether [STUDENT] was eligible for special education and related services due to a specific learning disability. Dist. Exs. 81-82; 3/23 TR at 32; ln 4-22 3/22 TR at 43-44; ln 18-1; 3/22 TR at 45; ln 10-18; 3/22 TR at 184; ln 4-6; 3/23 TR at 32; ln 4-22. The parents assert that the District should not have used the severe discrepancy model.

Prior to July, 2005, the Delaware Department of Education required all school districts to use "the discrepancy model" when determining whether a child has a specific learning disability.

AMSES at 37; *see also*, 14 DE Admin Code § 925.4.8. However, IDEA was amended and states can no longer *require* the use of the discrepancy model when determining whether a child has a specific learning disability but does not *prohibit* the use of the discrepancy model. 20 U.S.C. § 1414(b)(6)(A); 34 C.F.R. § 300.307(a). Counsel for Parents agreed during the hearing that the current law is that the Districts *may* use the severe discrepancy model but are not *required* to use it. 3/22 TR at 188-189; ln 12-5. Therefore, the panel finds that the team did not violate the IDEA by using the discrepancy model in making its determination.

The severe discrepancy model requires that in order for the team to determine that a child is eligible for special education services under the learning disability category, there must be

4.8.1 Written documentation for the formative intervention process used with a student ...

4.8.2 A comprehensive psychological assessment to evaluate student's reasoning and cognitive processes in order to rule out mental retardation and emotional disturbance; and

4.8.3 A severe discrepancy between achievement and ability in one or more of the following areas: oral expression, listening comprehension; written expression; basic reading skills (decoding), reading comprehension, mathematics calculation, or mathematics reasoning. *AMSES* at 37.

The District's school psychologist, Phyllis Tallos, testified that a severe discrepancy exists when there is more than a 20-22 point difference between the full scale IQ score (measured by the WISC-IV) and the achievement score (measured by the Woodcock-Johnson) or a difference of 1.5 standard deviations. 3/22 TR at 189; ln 21-22. Tallos interpreted Dr. Moroz's report with respect to IQ scores and testified that she did not see a severe discrepancy between [STUDENT]'s achievement scores and his IQ scores. While Dr. Moroz's report did not list a general intelligence score, Tallos was able to deduce his IQ from the information Dr.

Moroz did supply to determine that his IQ was in the low nineties. This score was consistent with the previous IQ score from third grade. 3/22 TR at 189-203; In 11-8. Tallos testified that in reviewing the achievement tests and comparing them to the child's IQ scores, there was not a severe discrepancy. The parents presented no witnesses to contradict Tallos' testimony.

While there was hearsay testimony in the form of Dr. Moroz's report indicating that [STUDENT] had dyslexia and dysgraphia, there was no non-hearsay evidence presented to support this position. Furthermore, there was no evidence presented that, assuming [STUDENT] in fact had dyslexia or dysgraphia, this condition caused him to need special education or related services. Parents assert that they had a witness who could support this position and were unfairly denied the opportunity to present their witness. This position is simply not supported by the record.

The only witness the Parents listed on their witness list prior to the start of the trial refused to testify when the District and DOE fairly raised the issue of her qualifications and the possibility that she may be participating in the unauthorized practice of psychology. When it was apparent the Parents had no other way to support their case, the District and DOE graciously agreed to a continuance of the hearing to allow the Parents time to find a witness who would support their position. The District even offered the names of individuals who might be able to help the Parents *and* waived their right to object to a witness who was not identified five (5) days prior to the hearing. The offer was made on April 16, 2007. At that point, the Parents had known for about two weeks that they may not have a qualified witness. Three more teleconferences were held before the next hearing date was scheduled approximately three weeks later on May 10, 2007. It was clear that May 10th was the day set for the Parents to proceed with their case. They appeared that day without their witness and requested another continuance with

no indication as to when they might be ready to proceed. The continuance was denied. On May 14, 2007, the final day of the scheduled hearing when the panel expected to hear from Father only, the Parents again requested a continuance indicating that they had resolved their financial problems with respect to their witness and wanted another day to present their witness. No explanation was given as to why they could not have produced their witness on the day first set for the hearing except that there were financial difficulties which were mysteriously resolved within twenty-four hours of the time when the continuance request was denied on May 10th. In her closing argument, counsel for the Parents argues what the Parents' witness would have said had he testified. The panel can not give that argument any weight as the Parents had the opportunity to present non-hearsay testimony and failed to do so. The Parents' position on this issue is simply not credible.

Part of the Parents' argument was that because [STUDENT] failed the DSTP in fourth grade, he should have been eligible for special education services. [STUDENT] scored a three in reading, math, and writing in third grade and met state standards on the DSTP. Dist. Ex. 65. However, he scored a one in reading and math and a two in writing and science in 4th grade on the DSTP. Dist Ex. 65. Dr. Julie Schmidt, Supervisor of Accountability for the District explained the Individual Student DSTP Profile for [STUDENT]. She pointed out that his records reflect that he did not answer a single question on the reading portion of the test indicating a motivation problem. Dist. Ex. 65; 3/27 TR at 12; ln 6. Marilyn Baker testified that she administered the DSTP test given to [STUDENT]. She indicated that he refused his 504 Accommodations, finished the tests in thirty minutes, and he refused to check his work. 3/27 TR at 57-60; ln 7-10. The panel finds that this testimony was a credible explanation as to why [STUDENT] did so poorly on the 4th grade DSTP test when he had passed in 3rd grade.

[STUDENT] was receiving many interventions during his time in the District. The District is required to try interventions before making the determination that a child is eligible for special education services. DOE Regs. 4.8. The panel is concerned that [STUDENT] had been diagnosed with ADHD as far back as 2nd grade and that the parents had not been regularly treating him for his condition. While the panel recognizes the parents' right to choose not to medicate their child, the panel also recognizes that the District should not be required to use additional supports for the child in school when the child's problem could have possibly been treated medically. The interventions used by the District were apparently working. [STUDENT] is an average student with an IQ in the low 90's. He was receiving average grades and making progress in reading, writing and math. Dist. Exs. 16, 23, 27, 38, 49, 51, 62, 66, 80-82 & 86; 3/28 TR at 31; ln 7-9; 3/28 TR at 39; ln 8-12. The panel can not find that [STUDENT] needed special education services.

2. If the Brandywine School District violated the IDEIA and Chapter 31 of Title 14 of the Delaware code is private school placement and tuition reimbursement the appropriate remedy for the violation?

As the panel found that the District did not violate the IDEA by failing to identify [STUDENT] as a child in need of special education services, there is no need to make a decision as to a remedy.

Furthermore, even if the panel had found that the child should have been identified as a child entitled to special education services, the panel could not have ordered the District to pay for the private school placement as the Parents presented no evidence to support their position that placement at the [private] School was appropriate. The only remedy the panel could have awarded would have been to order the District to prepare an IEP for the child.

DECISION

Based on the facts presented at the hearing, and the current law and regulations, the panel finds that the District met its burden by proving that the District did not violate the IDEA by failing to identify [STUDENT] as a child in need of special education and related services. [STUDENT] is not a child in need of special education and related services.

RELIEF

The request for private school tuition reimbursement is hereby denied.

RIGHT TO APPEAL

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

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

Dated: _____

Janell S. Ostroski, Esquire,
Chairperson

Dated: _____

Stephen Hailey

Dated: _____

John Werner