

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Regional School District No. 19

Appearing on behalf of the Student/Parents: Attorney Nicole Bernabo, Klebanoff & Alfano, 433 South Main St., Suite 102, West Hartford, CT 06110

Appearing on behalf of the District: Attorney Linda Yoder, Shipman & Goodwin, One Constitution Plaza, Hartford, CT 06103

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the District's proposed program for the Student for the 2007-2008 school year is appropriate.
2. If not, whether the Student shall continue to be placed at Perkins for the 2007-2008 school year.
3. Whether the Student requires a residential placement.

PROCEDURAL HISTORY:

The District received this request for hearing on June 15, 2007 [Exhibit B.O.-1] and a prehearing conference was held on July 2. This hearing proceeded on ten hearing dates from July to November 2007. Requests for postponements, cancellation of hearing dates and extensions of the mailing date of the decision were granted to accommodate counsels' scheduling conflicts. Closing arguments were presented on the last day of hearing.

The witnesses who appeared on behalf of the Parents were the Mother; the Father; Mary Zatta, assistant supervisor of Perkins School for the Blind's deaf blind program; and Ann Henry, Perkins mental health counselor.

The District's witnesses were Debra Hultgren, District director of special education; Theresa Grant, District speech pathologist/audiologist; and Sharon Cross-Coquillette, District teacher of the visually impaired.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

SUMMARY:

The 16 year old deaf-blind Student with CHARGE syndrome has been attending the Perkins School for the Blind since 2003. The Student moved to a new District in February 2007, and the District seeks to transition the Student to a program at the District high school. The Parents brought this hearing request to challenge the District's proposed program, and continue the placement of the Student at Perkins.

FINDINGS OF FACTS:

1. The Student is 16 years old and is currently attending the Perkins School for the Blind in Massachusetts. She is eligible for special education under the classification deaf-blindness. [Testimony Mother]¹
2. From age 3 to 11 ½, the Student was placed at the American School for the Deaf. Since January 2003, she has been enrolled at the Perkins School for the Blind. [Testimony Mother]
3. The Student is deaf-blind, with very limited vision and severe to profound bilateral hearing loss. She has been diagnosed with CHARGE, a syndrome with a pattern of birth defects. The letters in CHARGE stand for colomba of the eye, hear defects, atresia of the choanae, retardation of growth and development, and ear abnormalities and deafness. The Student's swallowing is impaired. She is mildly mentally retarded, anxious and has shown obsessive compulsive behaviors and exhibits inappropriate behaviors. [Testimony Mother]
4. Students with CHARGE have certain behavioral issues which include anxiety, issues of being over stimulated, difficulty with transitions and change, and obsessive compulsive behaviors. [Testimony Ms. Zatta]
5. Students such as the student in this case who are deaf-blind have needs with more complexity than those with merely a vision loss or a hearing loss. This is not merely a vision loss plus a hearing loss, as the two disabilities have a combination of effects, according to the Perkins staff. All information is clouded and confusing, and it is difficult for the students to figure out information. All things that we learn incidentally, the students have to be taught to help them make sense out of their world. [Testimony Ms. Zatta]
6. In terms of communication, the Student is primarily a verbal child, although she relies on sign language as a backup. [Testimony Mother] Having developed a good sign language base at the American School for the Deaf, sign with speech can help re-center the Student

¹ The Mother has finished her certification through UMass Boston, and currently works as an educational consultant for BESB, consulting with programs to assist teachers in planning for students with vision disabilities. [Testimony Mother] The Mother is well informed as to the Student's disabilities, and provided helpful testimony as to the Student's needs, strengths and weaknesses.

and help her redirect her attention to the positive, according to the BESB consultant. [Exhibit B-20] Therefore, the Student's aide and teacher must have a higher level of sign language to appropriately address the Student's needs. [Testimony Ms. Zatta]

7. The Student is primarily a large print [36 point] visual reader, with a reading comprehension at the 2nd to 3rd grade level. She is also learning Braille as her vision is fragile. [Testimony Mother]
8. The Student's behavioral issues include loud yelling, impulsivity, potentially hurting another student, loud screaming and throwing objects. She also perseverates on certain individuals. [Testimony Mother]
9. The Student's behaviors during the 2006-2007 school year included yelling at people, throwing things, and grabbing at people, their necklaces and their hair. She would engage in punching and kicking, and would grab and throw. She would tear things off the walls; if she was particularly overwrought, she could be quite destructive. She also had provocative behaviors, including taking her clothes off, and regressive behaviors like wetting herself. The Perkins staff member who is a licensed mental health counselor developed a behavior plan to address these behaviors. The behavior plan that was written for Perkins is used in all settings at Perkins, and written in Perkins short hand. As it was developed to be implemented in Perkins, in Perkins "short hand" it would not translate to another setting. The timeout room used at Perkins was an area outside of her classroom, where the Student could be away from the stimulation of other people. The Student is sensitive to lights; she doesn't like light and doesn't like darkness. This was taken into consideration in developing her timeout room. [Testimony Ms. Henry]
10. According to the annual education report completed by the BESB consultant, the Student has many strengths: she is personable, sociable and makes connections to people; she has good learning abilities; when at ease she can communicate and express herself well; she understands sign language; she has a talent and interest in some music and she has a sense of humor. She noted that underlying these strengths, the Student is also dealing with the physical, neurological and sensory issues of the diagnosis of CHARGE and, additionally adolescence/puberty, which impact her self awareness and self control during the day. The consultant noted that of primary concern is the unpredictability of the Student's behaviors that can be disruptive to her learning. These behaviors may be caused by both external and internal factors. The consultant noted that the external factors that are triggers are changes in routines or changes of staff; response to environmental factors, certain sounds in the environment and sounds of distress of other people. The internal factors are anxieties of anticipated events or transitions, triggers that cause a sensory over stimulation resulting in negative responses in others. [Exhibit B-20]
11. In October 2006, a hearing officer issued a decision regarding the appropriateness of the Student's program in the district in which the Family formerly resided. The hearing officer had ordered that the Plainville Board plan and execute a careful transition from Perkins to the Board program, noting that the Board's proposed program was a reasonable start, the hearing officer modified the Board's program to address the

Student's complex and serious needs. [Exhibit B-1] The Plainville staff had observed the Student for more than 60 hours by the time that decision was issued, and had substantially more experience with the Student and her needs than the current District.

12. Prior to the completion of the transition, the Family bought a home in Mansfield, which is part of the Regional School District No. 19. The Father, formerly with a police department that was near the prior school district, had taken a job with a university, which resulted in the move in February 2007 so that the family was closer to the Father's new job. [Testimony Mother, Exhibit P-50]
13. The Family sent a letter to the District to make the District aware of their arrival, and to allow the District a full opportunity to have all the information regarding the Student to plan for her arrival in the District. In the letter, the Family provided a full consent for the District to obtain the entire educational record from Plainville and offered to provide the hundreds of exhibits and the transcripts regarding the previous hearing to the District. [Exhibit P-50, Testimony Mother]
14. The Parents subsequently met with the District's Director of Special Education on January 30, 2007, provided the director with the exhibits from the previous hearing and discussed their concerns. The Family indicated that the Student was a challenging student who has never been a student in a public school. The Director told the Parents that she could program for any kind of disability, and that they had no outplaced students at the District. [Testimony Mother, Father]
15. The District convened a Planning and Placement Team [PPT] meeting on March 6, 2007, at which time all members of the PPT agreed to revise the IEP to extend the timelines for transition of the Student to the District to August 29, 2007. The IEP that was extended was the one the prior district had developed. The District noted that the return to the District would have to be extended, given that transition activities had not yet occurred with this District. The PPT recommended that a series of transitional activities would be conducted to facilitate the transition to the public school, including visits by District staff, training of staff, technical assistance to staff and visits by the Student. [Exhibit B-14]
16. When the team met at the first PPT, the Director testified that the District didn't have the time that the Plainville Board had had, so the plan was developed to continue the Student at Perkins so that the District would have time to work on the transition of the program to the District. [Testimony Ms. Hultgren] The Director had only one conversation with the staff at the Plainville schools regarding the Student, which lasted 30 minutes. [Testimony Ms. Hultgren]
17. As of the time of the first PPT meeting in March 2007, the Director was the only staff member who had visited Perkins and met the Student, although the District recommended transition to the District public high school at the time. [Testimony Ms. Hultgren] No team meetings were held between March 6 and the June PPT meeting to plan for the Student's program.

18. The Student had one visit to the school in April, when the other students were on April vacation. It was described by the Director as a pleasant but short visit, a tour of the school so that the Student could see the space when the other students were not present. The Student never visited the school while it was in session; she has had no other visits to the school prior to the planned transition to the public high school. [Testimony Mother, Ms. Hultgren] While there was some discussion of having the staff available for home visits or to see the Student in some other way, no such visitations or meetings occurred. [Testimony Ms. Hultgren]
19. Prior to the June PPT meeting, the District's speech and language pathologist, physical therapist, and the certified occupational therapist assistant made a visit to the Perkins school to observe the Student. The District director of special education also visited Perkins. [Testimony Mother] The Director visited Perkins for about 5 hours; the District staff who visited were at Perkins for a total of 4 to 5 hours each. [Testimony Ms. Hultgren] These visits and other transitional activities did not rise to the level of observations of the prior school district, although the District was aware of the extent of the transition planning of the prior district and was aware that the transition that the prior school district had implemented was not successful. [Testimony Ms. Hultgren]
20. The PPT reconvened in June. The Student's IEP was continued through the end of the school year at Perkins. During the PPT meeting, the PPT members discussed goals and objectives that were proposed by Perkins for the 2007-2008 school year. [Testimony Mother] The District Director felt it was Perkins' responsibility to draft the IEP. [Testimony Ms. Hultgren] No other goals were discussed other than the ones provided by the Perkins staff. [Testimony Mother]
21. At the PPT there was no discussion regarding the plan for the afterschool program, and no discussion at all about how the Student would be included in the general curriculum or the general educational environment. [Testimony Mother]
22. In terms of preparation for the Student's arrival in the school, the District indicated at the PPT meeting that it would use the week before school began to prepare for the Student's arrival and get the staff trained. The Parents were concerned as the staff needed to be thoroughly trained for the Student's needs, including learning sign language and drafting a plan to respond to the Student's behaviors. [Testimony Mother]
23. The Individualized Education Program [IEP] document indicated that the school year should be 180 days for the Student, although there was no discussion of that at the PPT. [Testimony Ms. Hultgren, Exhibit B-20]. Despite that notation on the IEP, extended school year services were planned, which included an offer for the Student to attend the public school summer school program when the Perkins summer program ended. As that was the week when the Family has their yearly vacation, the Family declined that program. The Family never refused to have the Student visit at another time. [Testimony Mother] The plan to have the Student attend the last one to two weeks of the District's existing summer school program was for transition purposes only; the District did not plan to implement her program during the summer, and the Student's programming

commencing at the beginning of the school year would be entirely different. [Testimony Ms. Hultgren]

24. The Director said that the schedule for the Student and the services that she receives would be provided to the Student as she demonstrates that she can tolerate more. The Director determined, without reliance on any evaluation or input from Perkins staff familiar with the Student, that it was not appropriate for the Student to continue to attend Perkins, while starting slowly to attend the District school as part of a transition, stating that the Student “doesn’t benefit from a little time here, a little time there.” [Testimony Ms. Hultgren]
25. This transition plan was completely inappropriate for this Student who had demonstrated difficulties with transitions, and was not sufficiently comprehensive to meet the Student’s needs.
26. The District staff has not written a behavioral plan, and is relying on the Perkins plan. [Testimony Ms. Grant] That plan was the plan that Perkins staff has testified is written in short hand and not one that translates into a new setting.
27. The District never addressed the behavioral concerns that the Student is inappropriate in her adolescent and impromptu behaviors. [Testimony Father]
28. At Perkins, the Student’s timeout room was purposely not in the same space where the Student was learning. The space can be a trigger, so it wouldn’t be appropriate for her timeout room to be in a learning space. The Student requires time in a separate space to regroup, calm down and to regain control over her emotions and behavior. [Testimony Mother] The District planned to identify a place for the Student’s calm down place to address behavior issues. The Student would be provided with an environment to sleep; the Student would not be sent home. [Testimony Ms. Hultgren] The Student’s place to lie down or take a nap would be provided either in the classroom, or in the nurse’s office which has six beds with curtains around them for kids who need to nap. [Testimony Ms. Hultgren] That plan does not meet the needs of the Student, who needs a space outside her classroom, away from other students.
29. The Parent was concerned about the restrictiveness of the Student’s planned program, in the planned “home base” for the Student. As it was planned for initially, the Student would be instructed in one room alone. The Parent was very concerned about this because the essence of her disabilities was isolating, and to isolate further by placing her alone in the classroom was not appropriate. [Testimony Mother] According to the District’s plan for the Student, the Student would start in her room on her own and, depending on how she was doing, it would be decided whether she could have interaction with others. [Testimony Father] Other than the “home base” for the Student, there has been no discussion on where the Student could receive academic instruction. [Testimony Ms. Grant] It was planned that the Student would receive all of her services in a special education environment. The Director noted that they gave it their best shot, based on their best guess, but it would have to change. [Testimony Ms. Hultgren] There was no

document that lists criteria that needed to be met for the Student to move out of her home base, her designated classroom. It would be an entirely subjective decision by the team of people working with her. [Testimony Ms. Hultgren] This isolating program is particularly inappropriate for the Student who is described as personable, social and one who makes connections to people.

30. The District assigned a classroom to the Student, so once the Student is in the building, no other student is assigned the classroom; that classroom space is exclusively the Student's. While the Director testified that it didn't preclude them from bringing in a group, the plan for her time with nondisabled peers in the IEP is not accurate according to the testimony of the Director. [Testimony Ms. Hultgren]
31. While the Director opined that the program at their high school would give the Student access to her community and to peers of her own age, the manner in which such access would be given was not outlined in the IEP. [Testimony Ms. Hultgren] The members of the PPT never discussed the time with nondisabled peers, and how that would be planned and executed. [Testimony Mother]
32. The transportation of the Student to the district school was not discussed at the PPT. [Testimony Ms. Hultgren]
33. In terms of the extended day program, there were no specifics planned for the Student's extracurricular activities or how to implement the program. [Testimony Ms. Hultgren] During the PPT meeting, the manner in which the Student was going to access the community center for an extended day program was not discussed, nor was it addressed in the IEP. There are no modifications/accommodations listed for the extended school day program. [Testimony Mother]
34. The IEP drafted was for the entire year, not the beginning of her school year, according to the Director. The Director explained that the IEP service page shows the range of services that the Student would receive, but doesn't suggest that on day one that she is going to do all of these things. No separate document was drafted to outline the services to be provided for the transitional time, nor indicating the proposed transition time. [Testimony Ms. Hultgren]
35. For the Student's first week or so in the district, the staff planned to have her in the restrictive environment, as the Student could not handle massive amounts of change. But, ultimately there would be several class environments and "certainly" community environments where the Student would receive her education. *If she reacts favorable*, the District would introduce another peer to the Student. [Testimony Ms. Hultgren] This was not reflected in the IEP proposed for the Student, which provided for 11.5 hours of time with nondisabled peers per week commencing on the first day of school. [Exhibit B-20, B-20a] The TVI testified that she doesn't know how the number of hours with nondisabled peers was determined. [Testimony Ms. Cross-Coquillette]

36. The Parents wanted the Student to stay at Perkins, as they felt that her current level of functioning was as a complex student who was making progress in her current environment. [Testimony Mother] At the PPT meeting, the District speech pathologist agreed that the Student should return to the District school because she felt it wasn't her position not to agree to that. [Testimony Ms. Grant] The District speech pathologist testified that she would have loved a discussion about whether or not the Student should be placed residentially at Perkins, but took the lead of the Director at the PPT meeting who provided the Parents with their rights for filing for due process when they requested placement at Perkins. The District speech pathologist testified that it had already been decided that the Student would be coming to the District prior to the PPT meeting. Testifying that she would be a "compliant employee," the speech pathologist said she would implement whatever the IEP would say. [Testimony Ms. Grant]
37. The planned first week of the Student's program that would be provided by the District would be more restrictive than her current program at Perkins. [Testimony Ms. Grant]
38. After the June 1 PPT, and prior to being hired as a TVI for the District, the District TVI observed the Student for a half hour while the Student ate lunch at Perkins. She also observed the Student on July 23 during the summer school program. [Testimony Ms. Cross-Coquillette] Ms. Cross-Coquillette only observed the Student during the school day at Perkins, as she was only going to provide services during the school day at the District school. The TVI is unaware of anyone from the District observing the Student outside of her academic day. [Testimony Ms. Cross-Coquillette] As of the date of her appearance at the hearing, the TVI had no scheduled days to observe the Student. [Testimony Ms. Cross-Coquillette]
39. The service grid of the IEP document was written to address corrections to the document, although this was done only after the due process hearing was initiated. [Testimony Ms. Hultgren, Exhibits B-20, B-20a] This service grid set forth the service providers for the Student which included a certified teacher of the visually impaired, who would be with the Student 50 percent of the Student's 45 hour school week; as well as a fulltime paraprofessional, a speech language pathologist, a physical therapist, an occupational therapist, a mobility specialist, a music therapist, a school social worker, and the deaf/blind consultant. These were set forth in the service page of the IEP, which was not provided to the Parents until after the due process request was filed. [Testimony Ms. Hultgren, Exhibit B-20a] The teacher of the visually impaired [TVI] has no deaf/blind certification, there was no school psychologist assigned to the Student, and no behavior specialist. [Testimony Ms. Hultgren]
40. As of the start of the 2007-2008 school year, the Student would not participate in the general education curriculum under the District's proposed plan. The service page, which indicates the time with nondisabled peers is the District's best guess on where they would provide services, according to the Director. The 11.5 hours of nondisabled peers was listed as the Student could go to the community center in her afterschool program, which is a normal environment where other kids might be participating in activities, according to the Director. The District did not plan to have the Student participating in

the regular education classrooms; the time with nondisabled peers as set forth in the IEP was solely for the community based activities. The Director also included time with nondisabled peers to include the time when the Student would be receiving one to one orientation and mobility training in the general public. [Testimony Ms. Hultgren, Exhibits B-20, B-20a]

41. The Director indicated that it would take about a month to prepare for the Student's arrival at the school, and indicated that prior to that they would need visits between the Student and the paraprofessional, and between the Student and the teacher of the visually impaired. They also would need to put together a schedule. [Testimony Ms. Hultgren] The Family was told that the staff would be arriving within a week of school starting, and that would be when they would be trained to deal with the Student's issues. [Testimony Father]
42. The District has begun weekly sign language training. [Testimony Ms. Hultgren] The speech pathologist is not a certified interpreter, not certified to instruct American Sign Language. [Testimony Ms. Grant] The TVI's level of signing is at a beginning level; she knows the manual alphabet and working on increasing her skills. [Testimony Ms. Cross-Coquillette] Her skills and experience in sign language are not appropriate to meet the needs of the Student.
43. In late September 2007, after the hearing had been proceeding for several months, and weeks after the start of school, the District TVI and District speech pathologist started to draft a schedule for the Student's first week of school. [Testimony Ms. Cross-Coquillette] The schedule that the TVI and speech pathologist drafted for the Student in late September 2007 was not consistent with the IEP proposed in the June PPT, as the TVI assumed that there would be another PPT meeting prior to the Student commencing her program at the District. In addition, some of the activities that were included in the proposed schedule included catching a weighted ball and carrying a full grocery bag, activities that are contraindicated for the Student with her medical issues. In the schedule there were no times set forth for the orientation and mobility training for the Student. [Testimony Ms. Cross-Coquillette]
44. The TVI testified that the goal for the Student was to be calm and comfortable, and that the team that would be with the Student at the time would determine her state of mind and make a determination on whether it would be wise or unwise to have a nondisabled peer with her. The TVI is not certain who made the decision that the Student be instructed primarily one to one. They planned to permit the Student to be with her peers when she demonstrates appropriate behavior. [Testimony Ms. Cross-Coquillette] The Student's program should provide meaningful benefit, not be aimed at keeping her calm and comfortable. The Student also should not be put in position of proving herself, prior to being permitted contact with peers, leaving the subjective decision to her providers. Rather, her program should address this, and the goals and objectives should be directed at improving the Student's behaviors.

45. Ms. Cross-Coquillette was hired to provide functional academics and Braille instruction to the Student, although she is not certified in regular education, nor as a special education teacher. [Testimony Ms. Cross-Coquillette]
46. The Parents believe that Perkins is appropriate as it is very flexible, with everything in place to meet the Student's needs. The Student has friends, she has opportunities to take breaks when she is unavailable for learning, the school offers her exposure to her goals and objectives every waking hour and there is safe incidental learning to practice skills throughout the day. The Student is learning to foster her independence. Perkins also appropriately responds to the Student's behavioral incidents, including appropriate use of physical holds in her outbursts. [Testimony Mother]
47. The Student's program for the 07-08 school year at Perkins is a hybrid program, with placement in the deaf blind program and classes in the secondary program. This program was designed to meet the Student's unique needs and provide her with an appropriate educational program. [Testimony Mother, Ms. Zatta]
48. The program at Perkins provided a behavior plan which included a timeout space for the Student, a quiet place to nap or be away from people. At Perkins the Student uses her cottage [her residential space] as well as a timeout space outside of her classroom for this purpose. [Testimony Mother] These appropriate spaces assisted the Student in deescalating, and allowed her to return to the learning environment and her peers.
49. Perkins uses the expanded core curriculum to provide vocational, independent living, assistive technology, computer training, orientation and mobility training, leisure and recreation, self advocacy and determination and community experience. [Testimony Ms. Zatta]
50. On the fifth hearing date in August 2007, the Parents were handed a letter that was in response to their letter of July 10. In that letter the District director indicated that Perkins would continue to work with the school; Perkins, however, never told the Family that they had been retained as consultants, and it is not in the IEP. The letter also did not accurately reflect what the Family was told about the classroom, which states that she would be paired with a special education classroom of 12 students. [Exhibit B-21, Testimony Father]
51. The hybrid program at Perkins was designed for the Student's unique needs. She was aging out of the program she had been in the prior year. The program was created for the Student to be appropriately academically challenging, provide opportunities for music in the secondary program which is a strength and interest for the Student, and provide specialists in her needs as a student with CHARGE in the deaf/blind program. [Testimony Ms. Henry]
52. The Student's daily living skills have been assessed in the 1st percentile. [Testimony Ms. Hultgren] The Student requires an extended day program for socialization with peers, and to work towards independence on her daily living skills. [Testimony Ms. Henry]

DISCUSSION/CONCLUSIONS OF LAW:

The Parents have brought this action in accordance with the Individuals with Disabilities Education Act which provides for special education and related services to children with disabilities, from birth through age 21, seeking continued placement of the Student at Perkins School for the Blind for the 2007-2008 school year.

I. Burden of Proof

In Connecticut, the regulations expressly state that the District has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 The District has not met its burden in this case.

II. Free Appropriate Public Education

The Supreme Court standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the District complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

Procedural flaws do not automatically require a finding of a denial of a free appropriate public education [FAPE]. Procedural inadequacies resulting in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in formulating the Individualized Education Program [IEP], clearly result in a denial of FAPE. *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072, 38 IDELR 91 (9th Cir.

2003), citing *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F. 2d 1479, 18 IDELR 1019 (9th Cir. 1992), accord, *W.A. v. Pascarella*, 153 F. Supp. 2d 144, 35 IDELR 91 (D. Conn 2001)

The Supreme Court has observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage ... as it did upon the measurement of the resulting IEP against a substantive standard." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982).

The Student's and the Parents' rights were denied, as they were denied a meaningful role in reviewing the proposed IEP for the Student, as the IEP presented by the Board was not the program that the District was prepared to provide the Student. The Parents were denied an opportunity to make an informed decision about the proposed IEP as the IEP as written was not the program that the District intended to provide to the Student when she transitioned into the District's program.

Notwithstanding that failure, however, the District has also failed to meet the second prong of *Rowley*. In determining whether the second prong of *Rowley* met, the requirement of a free appropriate public education is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. *Board of Education v. Rowley*, 458 U.S. at 203

The IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Hendrick Hudson v. Rowley* 458 U.S. at 204 When the

child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F.3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* This standard, however, contemplates more than mere trivial advancement. *Id.*

The Student's proposed program was a moving target, never appropriately articulated by the District. Moreover, the IEP as written was not reasonably calculated to provide the Student with educational benefit.

The Student's proposed program needs to be in place when she enters the program, and the Student should have a full educational program on day one, with access to peers on day one, particularly because she is motivated by connections to people. Otherwise her program would be unduly isolating. The proposed program merely provides for the Student to be in a room, isolated from all peers, disabled and nondisabled, with the Student being placed in a position of having to prove herself prior to having contact with any peers. That is not appropriate and does not address the Student's individual needs.

In determining whether the IEP was reasonably calculated to confer educational benefits, it must be determined whether the IEP states (1) the child's present level of educational performance; (2) the annual goals for the child; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6) objective criteria and evaluation procedures and schedules for determining, on at least

an annual basis, whether the goals are being achieved. *M.S. v. Yonkers*, 231 F. 3d 96 (2nd Cir. 2000), *citing Walczak v. Florida Union Free School*, 142 F. 3d 119, 122.

The Board's proposed IEP for the 2007-2008 school year was not appropriate. It was not reasonably calculated to enable the Student to obtain education benefit. It was not drafted based on the Student's individual needs, and failed to provide the appropriate services for the Student to obtain educational benefit.

The IEP failed to appropriately address the Student's behavioral needs. The Student has demonstrated and substantial behavioral issues, which seriously impair her ability to obtain educational benefit. In development of an IEP, the IEP team must consider:

- (i) The strengths of the child;
 - (ii) The concerns of the parents for enhancing the education of their child;
 - (iii) The results of the initial or most recent evaluation of the child; and
 - (iv) The academic, developmental, and functional needs of the child.
- (2) Consideration of special factors. The IEP Team must--
- (i) *In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . . 30 CFR Sec. 300.324 [Emphasis added]*

The Student has complex needs that have significantly interfered with the Student's educational performance. But, even in light of this, the Board did not propose the appropriate supports and services for the Student, and did not consider use of appropriate positive behavioral interventions and other supports that would address that behavior. The District's program for the 2007-2008 school year did not offer the Student a free appropriate public education.

While the District purports to be offering a program at the high school, which it claims provides the least restrictive environment, that argument is incorrect for twofold reasons.

First, the manner in which the District would implement the Student's program appears to be more restrictive than the private school placement, as it is planned that she would be educated alone, in an isolated classroom. Secondly, the least restrictive environment does not trump the requirement that a child receive an appropriate education. If a child's placement does not provide "significant learning" or "meaningful benefit" to the child, and a more restrictive program is likely to provide such benefit, then the child is entitled to be placed in that more restrictive program." See, e.g., *Dighton-Rehoboth Regional Sch. Dist.*, 4 ECLPR 721 (SEA MA 2006).

When it is determined that the Board's program is inappropriate, the parent is entitled to reimbursement if the parent's private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985)

Parents seeking an alternative placement are not subject to the same mainstreaming requirements as a school board. *M.S. ex rel S.S. v. Board of Education of the City of Yonkers*, 33 IDELR 183 (2nd Cir. 2000), citing *Warren G. v. Cumberland County School District*, 190 F. 3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect) Under the appropriate standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), citing *Florence County School District Four v. Carter*, 501 U.S. 7 (1993) Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether she will receive such an education. *Id.* The Student would not receive an appropriate education in the program proposed by the District.

The issue remains as to whether the Parents' placement of the Student is appropriate. The District stipulated that it is not contesting that the school could implement the IEP. The evidence supports that the Student has made progress at Perkins and that the program provides meaningful benefit to the Student. She is learning the appropriate skills in accordance with the expanded core curriculum with appropriate behavioral supports, individualized to meet her unique and complex needs. She has been placed in an appropriate hybrid program in the deaf/blind program with secondary classes at Perkins. The Student shall continue to be placed at the Perkins School for the Blind for the 2007-2008 school year, as it is appropriate, providing her meaningful educational benefit.

FINAL DECISION AND ORDER

1. The District's proposed program for the Student for the 2007-2008 school year is not appropriate.
2. The Student shall be continued to be placed at Perkins for the 2007-2008 school year as a residential placement.