

**DEPARTMENT OF EDUCATION
SPECIAL EDUCATION ADMINISTRATIVE HEARING PANEL**

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|-----------------------|---|-------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| ("STUDENT") |) | HEARING DECISION |
| |) | AND ORDER |
| Petitioner |) | DE DP 10-03 |
| |) | |
| v. |) | |
| |) | Hearing Dates: |
| RED CLAY CONSOLIDATED |) | April 28, 29, 30 2010 |
| SCHOOL DISTRICT |) | May 12, 2010 |
| |) | |
| Respondent |) | |

Due Process Hearing Panel for ("STUDENT") consisted of the following individuals:

Noel C. Burnham, Esquire – Panel Chair
Dr. Corinne Vinopol – Panel Member
Marcia DeWitt – Panel Member

1. The original Due Process Hearing Complaint Notice was filed on behalf of Petitioner ("STUDENT") with the Department of Education on or about December 22, 2009.
2. An initial Pre-Hearing Conference was conducted on January 13, 2010. Participating in the conference call were Panel Members, Counsel for District and Counsel for Petitioner.
3. On or about January 8, 2010 Counsel for District provided the Prior Written Notice dated October 27, 2009 as the District's response to the Petitioner's Complaint.
4. On January 14, 2010 District moved to join the DOE, which motion was granted.
5. A second Pre-Hearing Conference was conducted on February 3, 2010 with the same attendees and Ms. Catherine Hickey from the DOJ representing DOE.
6. The deadline set for providing an Opinion in this matter was extended several times and eventually the parties waived the deadline.
7. The Due Process Hearing was conducted on April 28, 29, 30 and May 12, 2009.
8. At the conclusion of the Hearing Petitioner and District submitted their closing Arguments to the Panel on June 11, 2010.
9. The Panel met to deliberate this decision on June 24, 2010.

STATEMENT OF ISSUES

At the Pre-Hearing Conferences Petitioner re-affirmed that the issues to be considered by the Panel were set out in the Notice of Complaint, to-wit

1. The District failed to provide an appropriate IEP for 6th and 7th grades
2. The District failed to implement the IEPs
3. The District failed to provide meaningful educational benefit

PETITIONER'S PROPOSED RESOLUTION

("STUDENT") requested an award of:

1. Placement in an appropriate program at the ("Private School") in Pennsylvania
2. Compensatory education for the duration of ("STUDENT's") denial of FAPE -grades 6 and 7

DISSENTING PANEL MEMBER'S FINDINGS OF FACT

1. ("STUDENT") is a young boy suffering from various medical diagnoses including Down Syndrome, mild bilateral hearing loss, nystagmus and celiac disease.
2. ("STUDENT") has attended the ("Public") program since 2000 with the exception of a short period of time when he attending another school.
3. The ("Public") program serves students through age 21 with a combination of disabilities.
4. From school years 2000-2001 through August 2007, ("STUDENT") received education pursuant to a Parent approved IEP.
5. Upon entering 6th grade - Middle School in October of 2008, the IEP team held an IEP meeting. The IEP team completed a new IEP for ("STUDENT"). Parent participated in the meeting but disputed the provisions of the new IEP. District delivered to Parent a Prior Written Notice and the new IEP was implemented.

6. At several IEP meetings held throughout the beginning of 7th grade in September and October of 2009 the IEP team completed a revised IEP for (“STUDENT”). Parent did not dispute any of the provisions of the revised IEP. At the completion of these meetings Parent for (“STUDENT”) did not sign the revised IEP and stated that she wished to review the final revised IEP with her husband.
7. The filing of the Due Process Hearing Complaint Notice filed on behalf of (“STUDENT”) on or about December 22, 2009 was the first notification to District that (“STUDENT”) did not agree with the revised IEP for 2009 and the first notification to District that (“STUDENT”) was requesting private placement.
8. Parent for (“STUDENT”) was involved in all IEP meetings called to create the IEPs for (“STUDENT”).
9. For the IEP year 2008-2009 (“STUDENT”) progressed from the ability to identify 6/50 functional sight words to being able to identify 44/50. For the IEP year 2009-2010 and based on a different criteria, (“STUDENT”) progressed from identifying 10/15 different fonts on index cards to 17/30. In addition (“STUDENT”) demonstrated the ability to form the initial sounds in 7/10 trials.
10. For the IEP year 2008-2009 (“STUDENT”) progressed in math from being able to count 1/10 trial to 6/10 trials with a number line and up to 5 in 3/10 trials without a number line.
11. The PLEPs for the year 2008-2009 and 2009-2010 indicate that in the other areas covered by the IEP such as speech and communications, PT, OT, writing and ability to follow ever increasing complex directions (“STUDENT”) is making progress.

DESSENTING PANEL MEMBER’S DECISION

A student receives FAPE where the state and school district have complied with the procedures set forth in the IDEA and the educational program offered is 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*”). In addition the 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. All this must be considered and included in any applicable IEP designed by an IEP team that will govern the educational program of the (“Student”). In addition, the test of an appropriate IEP is not a retroactive one, but rather a prospective one based on the information available to the IEP team at the time the IEP is formulated. *Carlisle Area Sch. V. Scott P.*, 62 F.3d 520 (3rd Cir. 1995)

One area where a measure of progress is helpful is in determining whether the IEP is being implemented. Yet even in the case where there is no or limited progress that factor is not fully determinative. *Colonial Sch. Dist.*, DP DE 08-16, slip op. (Apr. 13, 2009) . In the present case there has been progress.

DISSENTING PANEL MEMBER'S CONCLUSION

It is the dissenting Panel Member's opinion that based on the facts established at the hearing by testimony and exhibits and the current law and regulations, the District did provide FAPE to ("STUDENT") and that ("STUDENT's") requests for both compensatory education and private placement at ("Private School") should be denied.

Dissenting Panel Member agrees with the majority opinion that ("STUDENT's") requests for private placement at ("Private School") be denied.

RIGHT TO APPEAL

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

_____/s/_____
Noel C. Burnham