DEPARTMENT OF EDUCATION
SPECIAL EDUCATION ADMINISTRATIVE HEARING PANEL

IN THE MATTER OF:	)	
	)	
("STUDENT")	)	**HEARING DECISION**
Petitioner	)	**AND ORDER**
	)	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
Corinne Vinopol, Ph.D. – Panel Member
Marcia DeWitt, J.D. – 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. Petitioner and District submitted their closing Arguments to the Panel on June 11, 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 for ("STUDENT").

2. The District failed to implement the ("STUDENT's") IEPs.

3. The District failed to provide meaningful educational benefit to ("STUDENT").

PETITIONER'S PROPOSED RESOLUTION

("STUDENT") requested an award of:

1. Placement in an appropriate program at the ("Private School"); and

2. Compensatory education for the duration of ("STUDENT's") denial of a free appropriate public education (FAPE) for grades 6 and 7.

PANEL MEMBERS' FINDINGS OF FACT

1. ("STUDENT") is a ("young") student of the Red Clay School District who has been given 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 few months in first grade when he attended another school. The ("Public") program serves students with a variety of disabilities through age 21.

3. The ("Public") program followed no school-wide curriculum during the period under review, but is working on one now.

4. ("STUDENT") was originally classified for educational purposes as a student with educable mental retardation. This classification changed in November 2008 (6th grade) to trainable mental retardation consequent ("STUDENT's") triennial evaluation during the Summer of 2008 by school psychologist. Red Clay staff testified that classification has no bearing on determination of IEP goals.

5. In response to the Parent's request for an independent neuropsychological evaluation, one was conducted at the District expense on July 6, 2009 by Kristen Hertzel, Ph.D. Dr. Hertzel corroborated ("school psychologist's") finding of trainable mental retardation. Both Drs. Herzel and ("school psychologist") stressed the need for ("STUDENT") to work on functional academics, and both indicated that ("STUDENT") could learn.

6. From school years 2000-2001 through August 2007, ("STUDENT") received education pursuant to a Parent-approved IEP and made appropriate progress.

7. In 2007, the Parent expressed dissatisfaction with the nature of the ("Public") program at the middle school level as the appropriate educational path for ("STUDENT"). The Parent was offered the opportunity to the Intensive Learning Center on March 6, 2007. The Parent rejected this placement because of the number of students there with severe behavior problems. Another school offered was rejected because it is a lock-down facility.

8. ("STUDENT's") 5th grade IEP continued to be implemented at the outset of 6th grade.

9. An IEP meeting was held for ("STUDENT") shortly after his entry into the 6th grade (Middle School) in October of 2008. The Parent participated in the meeting but disputed the provisions of the new IEP that were developed at that time. Specifically, the Parent voiced dissatisfaction with District's desires to remove ("STUDENT") from academic inclusion classes at this point in his educational program and increased placement in vocational training opportunities. The District countered with concerns about the high content level of these inclusion classes and ("STUDENT's") disruptive behaviors during that time. The District delivered to the Parent a Prior Written Notice, and despite the Parent's failure to sign the document, the new IEP was implemented.

10. In the formulation of ("STUDENT's") 6th grade IEP, ("Ms. Special Teacher"), his classroom special education teacher, had no information as to the sight words that he had mastered during previous academic years. Sight word goals to be learned during the ensuing school year were established based on Parent and staff opinions, and not on current assessments of information taught previously or on a standard word list. The school was unable to document a starting point for ("STUDENT") for this school year or any clear measures of how progress for this year was to be measured. There was no curriculum for language or math used in the ("Public") program.

11. ("STUDENT") has been using an augmentative communication device (i.e., DynaMyte) since May 2006. Programming of the device followed one strategy for a number of years (i.e., inputting words in folders dedicated to specific situations or classes). In 2008, ("Ms. Specialist"), the augmentative communication specialist, recommended that the device be reprogrammed so that ("STUDENT") could work off of core vocabulary that could be generalized to different situations. This strategy also would eliminate a lot of redundancy. The Parent was resistive to this change but finally granted permission to implement it in January 2010. On October 28, 2008, ("Ms. Specialist") also began using a cable to connect the device with a computer to expand on its capabilities. Educational staff received repeated training on programming and use of the device. During testimony, ("Ms. Special Teacher") was unsure as to whether or not the speech/language goals on the October 2008 IEP bore any relation to what was programmed on ("STUDENT's") augmentative communication device.

12. There was frequent communication between the Parent and ("Ms. Special Teacher"), ("STUDENT's") 6th grade teacher, in the form of emails, telephone calls, and a daily agenda book for the first part of the year. The Parent did not voice dissatisfaction with ("STUDENT's") progress during these communications. The Parent did repeatedly voice displeasure with ("STUDENT's") being pulled out of his inclusion classes for participation in Special Olympics and vocational training, as this was contrary to the mainstreaming approach used during previous school years.

13. ("Ms. Special Teacher") was on maternity leave from December 16, 2008 through April 2009.

14. ("Mr. Special Teacher") taught ("STUDENT") for two weeks during ("STUDENT's") 6th grade and then again during the summer of 2009 and 7th grade. ("Mr. Special Teacher's") class focused on functional academics (e.g., money, counting, budgeting, shopping). Despite ("STUDENT") using the DynaMyte for expressive communication, ("Mr. Special Teacher") also had him keep words on cards attached to a ring. Also, despite the fact that testing showed that a phonetic approach to reading was contraindicated for ("STUDENT"), ("Mr. Special Teacher") worked with him on letter sounds. He did not follow any formal reading program or use any established word list. Although the speech/language pathologist shared a room with him, ("Mr. Special Teacher") was unaware of what he was working on with ("STUDENT").

15. ("STUDENT") received speech/language therapy 60 minutes/week delivered daily, and 60 minutes of consultation (to staff) monthly from the ("therapist"). The ("therapist") would periodically accompany ("STUDENT") to his inclusions classes and would program words into the DynaMyte.

16. During 7th grade, ("STUDENT") participated in social studies, science, art, chorus, homeroom, the cafeteria, and tutoring with typical peers. The Parent requested that ("STUDENT") not participate in vocational activities until he had mastered more basic academic skills.

17. ("STUDENT") was denied the opportunity to participate in some of his inclusion classes due to the fact that special education staff that normally would have accompanied him was assigned to supervise other students on field trips involving Special Olympics and prevocational training activities.

18. ("STUDENT") showed disruptive behaviors in some of his inclusion classes. When this occurred, he was removed. He responded better in class once a reward system for appropriate behavior was instituted. ("Mr. Special Teacher") never discussed what interventions to use with ("STUDENT") with the school psychologist.

19. In 2009, ("STUDENT's") goals for using his augmentative communication device ranged from using three-word phrases or sentences in 5 out of 10 opportunities to using three-word phrases or sentences in 8 out 10 opportunities and without prompts. This

represented very little variation from previous IEPs. In 2009, testing on ability to generate three-word phrases evidenced a drop in scores to 50% from 100% in 2008.

20. In the Fall of 2009, ("STUDENT") was counting only to four with consistency, as compared to being able to count to 5 in 2005. There was no evidence of improvement in ability to count using 1:1 correspondence between 5th and 7th grades. Nonetheless, this was the only math goal to appear in his last IEP. ("STUDENT") showed improvement in ability to subtract during the 2007-2008 school year (i.e., 10% in November 2007 and 65% by June 2008); however, this goal was inexplicably dropped in the last IEP.

21. ("STUDENT's") 4th and 5th grade IEPs challenged him to type his name and schedule words, looking for 100% accuracy. He performed these tasks with 50-75% accuracy. According to the Parent, after the end of 5th grade, rather than assisting and teaching ("STUDENT") to write his name, the school provided ("STUDENT") a stamper. As of spring of 2010, the Parent removed the stamper from being used by keeping it at her home. Through 2007 and 2008, ("STUDENT's") goals for writing his first and last names independently remained unchanged, and his accuracy range using a model also reflected no progress.

22. The District witnesses could not demonstrate any consistency in the sight word lists year after year. The sight word lists referred to in ("STUDENT's") IEP's, have no meaningful measurable basis to determine whether or not he is learning the words because the sight word lists changed year after year. Indeed, ("Ms. Special Teacher") admitted during testimony that she did not have a list or was otherwise unaware of which sight words were tested the year before, or what ("STUDENT's") success rate was on the words. Because the District did not require the teachers to share the functional sight word lists, and eliminate words previously mastered, it is impossible to determine whether the functional sight words that ("STUDENT") was "learning" were duplicative, and more importantly, whether he was actually making progress.

23. During several IEP meetings held in September and October of 2009, ("STUDENT's") 7th grade year, the IEP team completed a revised IEP for him. While the Parent asked many questions and raised issues, the Parent did not dispute any of the provisions of the revised IEP. Nonetheless, the Parent did not sign the revised IEP and stated that she wished to review it with her husband. The Parent also did not complete and return the transition survey which was sent to her prior to the meeting. The Parent did not request a private placement during the meetings.

24. The Parent asked school staff repeatedly for a reading specialist and a formal reading program for her child. ("District Administrator") responded to her that this was unnecessary and that the teachers could handle reading. He further testified that he did not think that ("STUDENT") would benefit from a reading specialist "as they exist in Delaware."

25. The Due Process Hearing Complaint Notice filed by the Parent on behalf of ("STUDENT") on or about December 22, 2009 was the first notification to the District

that the Parent did not agree with the revised 2009 IEP and the first notification to the District that a private placement was being requested for ("STUDENT").

26. The ("Public") program is housed in a building with regular education students. Special education students have opportunities to participate with typical peers in inclusion classes and nonacademic situations (e.g., lunch, recess, homeroom).

27. The typical ("Public") program class has a student-to-staff ratio of 6 students:1 teacher:2-3 paraprofessionals.

28. ("Public") program espouses a transdisciplinary approach for delivery of occupational therapy, speech/language therapy, and physical therapy. Support staff work within the classrooms.

29. ("Private") school is a private placement that is located in another state and is approximately 1 hour and 20 minutes from where ("STUDENT") lives. There are three classes in the middle school and no inclusion classes are offered. Students are visited by typical peers once a week to play board games. Only one other student in the school has an augmentative communication device, and there is little encouragement to use it. ("Private") school follows a standardized curriculum (i.e., Edmark Series) for reading and mathematics (i.e., Above and Beyond, Digiblocks). Students are not introduced to vocational experiences until "later" in their school experience. There is no augmentative communication specialist at the school, and the speech/language therapist is provided by the county.

PANEL MEMBERS' 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.

It is the Majority Panel Members' opinion that the District did not meet its burden of proof that they provided ("STUDENT") with FAPE during his 6th and 7th grade school years. Based on the facts established at the hearing by testimony, exhibits, and the current law and regulations, we find the District did not develop IEP's for those years that were reasonably calculated to provide ("STUDENT") with educational benefit. The IEP's for ("STUDENT's") 6th and 7th grade years showed a remarkable similarity to what was already established in 5th grade. What was particularly poignant was that goals were established from year to year with little regard for what had transpired during previous years. This was especially evident as regards reading in that there was no investigation from year to year as to whether word lists to be learned

included words already mastered during previous years. As a consequence, perceived progress could, in truth, reflect information already learned. There is no persuasive evidence of actual progress over the almost two-year period in question.

There were similar deficiencies in the math program as well, in that there was no curriculum, no methodology, or materials appropriate for ("STUDENT's") needs. It appears the program is a repetition from year to year of what ("STUDENT") was expected to learn. If the program wasn't working, it needed to be corrected, but there was no way for the teachers to assess if ("STUDENT") was simply relearning the same information and/or if he was not making progress in their current program. Again, both experts indicated that this child needed basic functional math for his appropriate program.

The District's argument that they take a "toolbox" approach to instruction, rather than use an established curriculum, is not persuasive in that, as practiced, there is no assurance that the child carries the same toolbox from year to year. Apparently, each year, the child is given a new toolbox with little regard as to which tools the child has already mastered and what new tools should be added to the box.

Testimony that the ("Public") program is now developing a curriculum speaks to their recognition that guidance in building skills in a developmental and/or consecutive fashion is warranted within the program. The Panel does not mandate any particular or specific curriculum but requires that one, whether commercial or internally developed, be present to substantiate a consistent and meaningful path by which ("STUDENT") can learn. The lengthy hearing and the multiplicity of arguments offered by the District could not overcome the basic educational flaw that the IEP's and the actual programs provided to ("STUDENT") in both the 6th and 7th grade years lacked this cohesive component.

While the parent had concerns about the communication device, how it was used, and how it was managed within the entire school program, it appeared from testimony that good resources were applied to addressing ("STUDENT's") needs. However, there seemed to be some confusion and lack of understanding about the methodology that the school was using, which raised questions about the effectiveness of the child to communicate in his settings. Testimony from both sides indicated that these resources were not effectively integrated within the various classes until after the due process appeal was filed.

There appears to be two other glaring omissions to the educational options available to children, such as ("STUDENT"). First, if a parent requests that their intellectually challenged child not receive early vocational training, accommodations to otherwise serve the child are frequently compromised based on the needs of the prevailing program. The parent stated that the vocational skill training should come later after the child has mastered a higher level of basic educational skills. Testimony indicated that while the school did not send the child to the vocational program in keeping with the Parent's request, nonetheless, they often failed to provide the agreed-upon alternative instruction because that is "not how their program is structured." The testimony gave the appearance that the District's behavior was almost punitive toward ("STUDENT") by failing to implement the Parent's request for a more mainstreamed approach to ("STUDENT's") schooling.

Second, ("District Administrator's") testimony that children who are intellectually challenged would not receive benefit from reading specialists as they exist in Delaware is decidedly prejudicial. This child, ("STUDENT"), can learn if given the right tools. He demonstrated this during the five previous years.

There were no violations of Due Process in this case.

ORDER

Placement:

Pursuant to *Carlisle* and *Coale v. State Dept. of Education and the Brandywine School District*, 162 F.Supp, 2nd 316,157 Ed. Law Rep. 142, "the placement that is best suited to a disabled student is the one that is reasonably calculated to provide meaningful educational benefits in the least restrictive environment." The ("Public") program as offered to ("STUDENT") for the coming school year provides superior benefits to the nonpublic program placement requested by the Parent. The ("Public") program is far closer to his home, has all support services in-house and integrated, has an augmentative communication specialist who can oversee use ("STUDENT's") device and train staff in its use, has numerous inclusion opportunities, has well-planned vocational training opportunities beginning in the 8th grade, and provides post-school planning.

It is anticipated that the ("Public") program has by now developed a curriculum-based program for reading and math that will meet the needs of ("STUDENT"). Testimony from the school indicated that it was being established and would be required for ("STUDENT") for school year 2010-1011. In addition, the many services offered to ("STUDENT") need to be fully integrated to provide to him an effective program where he can demonstrably learn the needed basic functional skills. For these reasons and for those as expressed in Findings of Fact #29, placement at ("Private") School is denied.

Compensatory Education:

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

Because of the failure of the District to provide ("STUDENT") with a cohesive educational plan during his 6th and 7th grade years, particularly as it relates to reading, math, and writing skills, compensatory education in the form of a reading specialist and math specialist to work with ("STUDENT") and the support staff, for a minimum of an hour per week for two years is hereby ordered.

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/_____
Marcia DeWitt, J.D.

_/s/_____
Corinne K. Vinopol. Ph.D.