

BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

IN RE:

_____, by and through his parents, ____ and ____

vs.

PERRY COUNTY R-32 SCHOOL DISTRICT

COVER SHEET OF PERSONALLY IDENTIFIABLE INFORMATION

The parties to this hearing are:

_____, Student

DOB: _____

Grade Level: 7th

Carbondale, Illinois

Mr. _____, Father

Mrs. _____, Mother

Perry County R-32 School District

c/o Aime Parenteau, Director of Special Services

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Perryville, Missouri 63775

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BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

IN RE:

____, by and through his parents, ____ and ____

vs.

PERRY COUNTY R-32 SCHOOL DISTRICT

ISSUES AND PURPOSE OF THE HEARING

1. Whether the Perry County R-32 School District provided with a free appropriate public education in the least restrictive environment during the 1995-96 and 1996-97 school years?
2. If the District failed to offer __ a free appropriate public education in the least restrictive environment, whether the Brehm School, a private school for learning disabled students, is an appropriate educational placement for __?
3. Whether the __ are entitled to reimbursement for their unilateral placement of __ at the Brehm School?
4. Where should __ be placed for the 1997-98 school year?

TIME-LINE INFORMATION

The request for hearing was received by the Department of Education on August 26, 1997. By letter from Petitioners' attorney dated September 12, 1997, the hearing was continued from the original forty-five day time-line and set for hearing on November 20 and 21, 1997. Request was

subsequently made by the attorney for the Petitioners to continue the matter from November 20 and 21, 1997 to January 13 and 14, 1998.

The hearing was partially held on January 13 and 14, 1998. The parties requested that the hearing be concluded on March 30 and 31, 1998. The hearing was recessed and accordingly resumed on March 30, 1998. It concluded on March 31, 1998. The parties were given until May 8, 1998 to submit proposed findings of facts and conclusions. The parties agreed that the Panel's decision and order be completed and placed in the mail to them not later than June 8, 1998.

FINDINGS OF FACT

1. ___ is a ___ year old (DOB: ___) male student who resides in the Perry County R-32 School District (the "District") and currently attends the Brehm School in Carbondale, Illinois.

2. ___ parents are ___ and ___.

3. While a student at the District, ___ was diagnosed with a learning disability in the area of written expression pursuant to the Individuals with Disabilities Education Act ("IDEA") and the Missouri State Plan for Part B of the IDEA.

4. From kindergarten through 3rd grade, ___ attended school at St. Joseph School, a parochial school. In April 1992, ___ parochial teacher referred ___ to the District for possible special education services due to academic difficulties.

5. On or about September 17, 1992, the District evaluated ___. The cognitive testing conducted by the District showed that ___ had a verbal IQ of 80, a performance IQ of 67, and a full scale IQ of 71. Based on the results of the tests administered, the team concluded that ___ met the eligibility criteria to be diagnosed as learning disabled in the area of written expression and was eligible for related services of occupational therapy.

6. On or about October 3, 1995, the District reevaluated ___. The tests showed that ___ had a verbal IQ of 74, a performance IQ of 57, and a full scale IQ of 63. He was classified as "mild mental retardation." The behavioral observations on the "assessment summary" stated as follows:

" ___ lacked persistence to complete a task. He would quit before the time allowance was up and he would respond "I don't know to many verbal test items. I have no reason to question the validity or reliability of these test scores."

On or about October 24, 1995, the Diagnostic Team discussed the results of ___ testing with the parents and changed his classification to "Borderline."

7. On or about November 12, 1996, the District reevaluated ___. The cognitive testing conducted by the District showed that ___ had a verbal IQ of 73, a performance IQ of 60, and a full scale IQ of 64. He was classified as "mild mental retardation." The "diagnostic conclusions" included the following statement:

"The diagnostic team discussed the need to address school concerns in light of this measure of intellectual intelligence. In addition, we discussed the need to modify his educational program to meet his intellectual needs and abilities. The Individual Education Plan committee will meet and discuss the specific modifications." There is no evidence of any modifications to ___ IEP pursuant to the finding of "mild mental retardation." Mr. Aime Parenteau, the current Director of Special Services for the District, testified as follows:

"If he (___) was truly mild mentally retarded, he might need a program more in the functional area. Less abstracts, less complex academics. Worried about his future in terms of his functioning is so low that he may not be able to go on. If he's learning disabled, there is always that chance that he could do well in certain levels of academics.

We look at performance and academic tasks, teacher reports, teacher observations, adaptive behavior, social skills, all of that. If it looks like the child needs a lot more protection and a lot more functional skills based on a body of information, then we might go to a more restrictive positioning."

Although the supplement to ___ IEP dated December 17, 1996 (Respondent's R-89) indicates some "adaptation/modifications" for ___, it is not clear that the District considered any modifications to ___ IEP as a result of his being classified "mild mental retardation" on or about November 16, 1996. There is evidence that ___ was taken out of his regular science class and placed in a resource science class as a result of his mother's request.

8. During the school year 1992-93, Rita Weber, was ___ L.D. teacher. During the 1993-94 school year, Julie Lappe was ___ L.D. teacher. During the 1994-95 school year, Patricia Jones was ___ L.D. teacher. During the 1995-96 school year, was ___ L.D. teacher. During the 1996 - 97 school year, Kym Bock was ___ L.D. teacher.

9. On or about October 17, 1995, ___ IEP teams was convened to write ___ IEP for the ensuing year. The team consisted of Rita Weber, L.D. teacher, ___, ___, mother, and Mark Bowles,

assistant principal. There was no evidence that Mr. Bowles had the certification to provide or supervise the provision of special education. Also, none of ___ regular teachers, or a speech pathologist attended the IEP meeting.

10. On or about October 10, 1996, ___ IEP team was to be convened to write ___ IEP for the ensuing year. His IEP team consisted of Ms. Bock, L.D. teacher, Mr. Aime Parenteau, director of special services, Mr. Bowles, the assistant principal, ___ speech implementor, and ___ social studies and science teachers. However, in attendance at the IEP meeting were Mrs. __ , __ mother, Kym Bock, and the occupational therapist.

11. With respect to both the IEP written on October 17, 1995 and October 10, 1996, there was no team input with respect to the establishment of goals and short term objectives. The L.D. teacher wrote the goal and short term objectives for improvement in written expression, the speech therapist wrote the goal and short term objectives regarding receptive and expressive language abilities, and the goal and short term objectives regarding sequential cognitive abilities. The occupational therapist wrote the goal and short term objectives regarding ___ visual-motor and visual-perceptual skills.

12. Dr. Lillian M. Brown, a speech pathologist and , who has a doctorate in communication disorder and science, administered a test to ~ in June, 1997 for a central auditory processing evaluation. At the hearing, Dr. Brown testified that ~ had severe central auditory processing problems. Dr. Brown concluded that his central auditory processing deficit significantly impacted _ memory, decoding and integration abilities; that he has significant difficulty in processing an auditory signal in one ear when there is a competing signal in the opposite ear; that his deficits impact his ability to read and spell and in syntax. The Panel credits Dr. Brown's testimony.

13. Dr. Brown testified that a simple test called SCAN can be administered in about 15 minutes in order to determine whether or not there might be a central auditory processing problem. District witnesses acknowledged that they were in varying degrees familiar with the SCAN test and that such a test had been administered in behalf of the District to other students by outsourcing the work to Southeast Missouri University. Dr. Brown testified that in her opinion the District erred in not having the SCAN test administered to ___ because of his learning disability, his severe language problems, and his diagnosis that he had ADD. The Panel credits Dr. Brown's testimony. Moreover, Nancy Robinson, a speech therapy supervisor and a witness for the District, testified that she had had an opportunity to review Dr. Brown's evaluation report concerning ___ that she did not question the validity or accuracy of her findings and that she agreed with the recommendations contained therein.

14. Dr. Brown testified that the October 17, 1995 IEP for ___ made no reference whatsoever to central auditory processing and that the "present level of educational placement" was so generalized that she could not tell what his present level of performance was. She further testified that the short term objectives concerning ___ receptive and expressive language abilities and his sequential cognitive abilities did not appropriately address his central auditory processing deficits. She further indicated that they were written in such a manner as to be difficult to measure. Dr. Brown had similar criticisms of ___ IEP dated October 11, 1996. Namely, that the present level of educational performance was far too general, and she could not determine from the statement what his actual present level of educational performance was at that time. Since the goals and objectives were the same as same as in the prior year's IEP, she had the same criticism regarding

the objectives relating to ___ receptive and expressly language abilities and his sequential cognitive abilities.

15. Dr. Brown also testified that the related services on the IEPs of October 17, 1995 and October 10, 1996 were deficient with respect to the amount of time allotted for speech, language, and occupational therapy. She would have allowed a total of 150 minutes per week rather than the 70 minutes allotted in 1995 and 45 minutes allotted in 1996.

16. The IEPs for ___ for school years 1993-94, 1994-95, 1995-96, and 1996-97 contained very similar and generalized statements about his present level of performance, none of which specifically described level of performance; the goals and short term objectives never changed from year to year, and although the IEP form contains columns for "evaluation results" for each of the short term objectives, the school district produced no documentary evidence of what those evaluation results were.

17. At no time during the 1995-96 or 1996-97 school year did ___ IEP team meet as a group, including his regular education teachers, L.D. teacher, speech pathologist and an administrator qualified to provide or supervise the provision of special education services in order to discuss ___ deficits, his learning needs, and any additional modifications that might be necessary in order to assist him to succeed.

18. There was very little, if any, coordination between ___ L.D. teacher and the regular education teachers in 1995-96 or 1996-97.

19. Although District contends that ___ L.D. teacher was aware of his current level of educational performance, ___ had different L.D. teachers for each school year from 1993-94 through 1996-97. Therefore, they could not tell from firsthand knowledge whether ___ had met any of his objectives from the prior year or to what extent.

20. The recommendations made by Dr. Brown concerning accommodations that should be made for ___ could be implemented by the District.

21. During the 1995-96 and 1996-97 school years ___ became increasingly frustrated with his inability to do his homework. His parents testified that they spent as much as three to four hours a night with ___ trying to complete his homework assignments. ___ lost self-esteem and finally stopped bringing his homework home. ___, L.D. teacher in 1996-97 finally took ___ out of his regular science class and put him in L.D. science because of the mother's request.

22. ___ mother, in her frustration, enrolled ___ in a private learning center called the Sylvan Learning Center located in Cape Girardeau. She took him there twice a week for one hour sessions each time during the 1996-97 school year. He made some improvement in reading and his self-esteem improved somewhat while he attended Sylvan. ___ parents continued to take ___ to the Sylvan Learning Center for a year and a half.

23. ___ mother testified that in attempting to assist him to do his homework, she found that ___ did not understand how to go back through a chapter in order to find answers to questions.

24. Ms. Sidney Hemmann, Director of Special Education Services for the District during the school years 1992-93 and 1993-94, reviewed the IEPs for those years and admitted that the short term objectives could have been written in more measurable terms.

25. Ms. Hemmann testified that she was familiar with the SCAN test, but she did not know why the District did not administer it as a matter of course. She indicated that the IEP team would - decide whether the SCAN should be administered or not, and if so, it would be administered by Southeast Missouri University in Cape Girardeau.

26. Ms. Hemmann explained the meaning of the columns headed "Evaluation Results" objectives were set on those pages of the IEP where short term down. Under the heading of "Evaluation Results" there were two columns, one for "Review" and one for "End." Ms. Hemmann indicated that if there was a review of an objective, it should have been written in that column. The end result then would be written in the column under the word, "End." She indicated that in those columns, teachers normally write whether or not to continue or if a goal was met or the

objective met. However, there was no information in those columns except for one year, the 1992-93 school year. Ms. Hemmann indicated that there could have been other copies of these sheets kept by the teacher and turned in at the end of the year to the administration. However, there were no such sheets produced at the hearing. She then explained that even if there were no written reports of progress, the parent would normally hear about the progress at an IEP meeting with the L.D. teacher because the same L.D. teacher often times worked with the child. However, in ___ case, he had different L.D. teachers for his last four years at the District.

27. ___ L.D. teacher for 1995-96 was Rita Weber. She was asked if she believed that ___ made educational or academic progress in her class. She could produce no written documentation which measured his progress. When asked whether she took ___ mother's concerns about math to the math teacher, she indicated that she believed she conversed at least one time. Ms. Weber had little, if any, communication with ___, regular education teachers insofar as coordinating or implementing strategies to accommodate his deficits. Although ___ was having difficulties in math, Ms. Weber never did check with the math teacher to determine whether any strategies were being used to help ___ to complete his assignments. She also testified that she was uninformed with regard to any strategies being implemented by the social studies or science teachers in order to assist ___. She was not even sure whether or not the regular classroom teachers had a copy of ___ IEP. She was asked:

Question: "Now, did you at any time throughout the school year check with any of the regular education teachers to see if these modifications were being implemented?"

Answer: "I can't remember specifically doing that, but I mean we would talk in the hallway informally. It was done informally." Tr. Vol. I, March 30, 1998, p. 146-147.

28. When asked why she had written goals and objectives for ___ in spelling since he was an average speller in class, Ms. Weber stated:

"I guess I was thinking in terms of the amount of effort that ___ would be willing to maybe put out, and I was speculating." Tr. Vol. I, March 30, 1998, p. 153.

29. Ms. Weber was asked if she ever spent any time observing ___ in his regular classes. Her answer was, "No, Ma'am."

There is no evidence that Ms. Weber had any meetings with ___ teachers or his L.D. teacher

for the previous year to determine what progress he had made towards meeting his goals and short term objectives. Nor did she have any meetings with the IEP team, or any individuals within the IEP team in order to write the goals and short term objectives for the current year, 1995-96. She explained the lack of such collaborative effort as follows:

"It was basically we felt at that time that his needs, his educational needs, were being met with the program that was started at the beginning of the year for the previous IEP, and we wanted to continue his educational program in the same manner for his 5th grade year." Tr. Vol. I, March 30, 1998, p. 175.

31. Speech therapy was reduced from 40 minutes per week to 30 minutes per week from 1995-96 to 1996-97 although ___ did not achieve at least one-half of the objectives in 1995-96.

32. Nancy Anderson was ___ 6th grade math teacher. She testified that his math grades were as follows: C+, first quarter; D+, second quarter; F. third quarter; and D, fourth quarter. Ms. Anderson was asked whether she had any discussion with ___ L.D. teacher about his failing grades. She could not recall if she had. Ms. Anderson indicated that ___ learning disability could have affected her math class, but no one from the IEP team met with her to discuss any modifications in her class. She said that she never saw ___ IEPs from the 1995-96 or 1996-97 school years.

33. Kym Bock was ___ L.D. teacher during the 1996-97 school year. She was asked whether she thought ___ was benefiting academically and educationally in her class. She responded, "Yes." However, there was no written documentation to show what progress ___ made. When asked what she thought his strengths and weaknesses were academically, she stated that she thought his strengths were in math in spite of the fact that he was graded D+ in the second quarter, F in the third quarter, and D in the fourth quarter.

34. Ms. Bock acknowledged that ___ was having socialization problems in his regular classes which was manifested by a lack of communication with other students, but she said that she did not witness it. She said that she didn't know if he had any friends in his regular classes. She did not indicate whether she made any inquiries about his socialization problems. When asked whether she had any discussions with the math teacher about ___ problems, she answered, "We had little or no contact." Tr. Vol. II, March 31, 1998, p. 87.

35. When ___ related services in language and O.T. were reduced, the L.D. teacher did not question the reduction, although she was ___ team leader. Nor did she ask the speech therapist

or implementer whether or not ___ had accomplished or achieved his goals in receptive and expressive language and sequential cognitive abilities.

36. When asked why certain of ___ IEP objectives aimed at 70% accuracy and 80% accuracy year after year, she responded:

"Because we felt 70 is approximately C range and B range for 80%. Those would be where we expect him to be able to do the work that we gave him on his level." Tr. Vol. II, March 31, 1998, p. 131.

When asked how that determination was made, Ms. Bock responded:

"It's just where we would like them to be for their grades. If we think it's--A goal is what we hope to help them achieve." Tr. Vol. II, March 31, 1998, p. 132.

There was no other analysis in establishing these objectives.

37. On or about August 18, 1997, Petitioners' attorney, Katherine Black, wrote to the District's superintendent of schools, Dr. Rex Miller, to inform him that the ___ were requesting due process and specifically were requesting reimbursement for their unilateral placement of ___ at the Brehm School in Carbondale, Illinois. Prior to that time, the ___ had never requested ___ IEP team to place him at the Brehm School. The ___ request, according to Ms. Black's letter, was based on the alleged failure of the District to provide a free appropriate public education during the 1995-96 and 1996-97 school years.

38. The District failed to give the ___ notice of their rights under IDEA concerning unilateral placement of ___ in the Brehm School.

39. The ___ request was formally filed with the Missouri Department of Elementary and Secondary Education on August 29, 1997.

40. The ___ enrolled ___ in the Brehm School at the beginning of the 1997-98 school year. He did not attend class at the Perry County 32 School District at any time during the 1997-98 school year.

41. On or about September 10, 1997, the District convened a meeting at which Dr. Miller, the Superintendent, Kym Bock, Aime Parenteau, and other staff attended. Mr. and Mrs. ___ were present and Ms. Black participated by telephone. The purpose of the meeting was to determine why the ___ had unilaterally placed ___ at Brehm. During that meeting, Ms. Black informed the

District that ___ had been diagnosed with central auditory processing disorder pursuant to an evaluation by Dr. Brown. The ___ did not share Dr. Brown's written evaluation with the District at that time or any other time. The evaluation apparently was completed in June. The District inquired as to whether the be willing to re-enroll ___ in the District. Ms. Black indicated that re-enrollment could occur only if the District could replicate the Brehm program in full. Mr. Parenteau asked for examples of what the Brehm program was doing, and Ms. Black gave some examples. Mr. Parenteau responded that the District was already doing some of the things. The conversation then shifted to how Mrs. ___ thought that ___ self-esteem was being addressed at Brehm. The ___ did not ask the District to rewrite ___ IEP to replicate the Brehm examples that were given. Nor did the District request that the IEP be written to do that. The conference ended with no progress being made.

42. The Brehm School is a school for learning disabled children and no non-disabled children attend there. Boards at the Brehm School and goes home to visit every other weekend.

43. Several representatives of the Brehm School testified and explained the Brehm program in general and the specific program that had been put together for ___ (identified as "student progress plan at Brehm"). Dixie Conner, the supervisor of educational services at Brehm Preparatory School, testified. Ms. Conner has a bachelor's degree in special education of learning disabilities and social and emotional disabilities. She is finishing her master's degree in school counseling, and she has 15 years teaching experience in public and private settings. She testified that Brehm is approved by the State of Illinois to educate students and that the Brehm School primarily educates students with learning disabilities. They also serve students with attention deficit disorders and auditory processing deficits, primarily language disabilities. She supervises ___ teaching staff. I that capacity, she supervises and facilitates the programming for ___, including strategy developments. She testified that she met with ___ teachers at the beginning of the year and twice a month during September and October. Since that time, they have a meeting, monthly. These meetings do not relate specifically to ___ but to all students in their classrooms. Ms. Conner reviewed Brehm records relating to ___ including a document that described core areas identified by ___ IEP team which created a student progress plan for him.

44. Although ___ would have no interaction with non-disabled peers during class time, he has an opportunity to participate with non-disabled individuals in "community activities" which is part of the recreation program of the Brehm School. Brehm creates opportunities such as going to a ball game or to a church activity or participating in other social activities sponsored by a community organization.

45. Ms. Conner gave her opinion that it is not detrimental for ___ to attend classes where no regular education students are located. She stated that ___ has experienced so much failure in the regular educational setting, that he needs to start feeling some success in order to feel good about himself.

46. The content of the classes attended by individualized per student and accommodations are individualized as well. Each student at Brehm works at his own pace. Ms. Conner testified that all students at Brehm are given a lot of personal attention in the area of their learning disability. A class size at Brehm is not more than 8 students per teacher however, there are 4 to 5 students per teacher.

47. Terri Clough testified. She is ___ advisor and teaches him language arts. She has him in class every day and sees him every morning before he goes to class for 15 minutes in her role as his advisor. She makes sure that he is organized and addresses any problems that he might be having. She also makes sure that his homework has been done and checks to see what type of tutorial help he has been getting in the evening. She also checks with his dorm parents. She makes notes of this information and takes it to the team meetings for ___. The team meets every week.

48. As his language arts teacher, Ms. Clough testified that she was teaching him remedial reading, written expression, and some parts of English. She described specific areas in which she has been working with ___. She stated that at first he was unable to write a sentence with a capital letter or a period and in some instances not able to write a complete sentence. She has worked with him on formulating complete sentences. She also worked with him in reading. The reading is controlled in that the vocabulary is controlled so that it is suitable to ___ abilities. Ms. Clough indicated that ___ has progressed to the point where he can that have a topic sentence with reading comprehension. She worked individually with him in all of these areas. She testified that he has shown improvement in all of the areas. Ms. Clough goes into great detail as to what is being done to help

in his various classes and what a team of teachers is attempting to do in creating strategies to help ___ in the courses that he is taking and in general.

49. Ms. Clough indicated that she believes Brehm is an appropriate placement for ___ because he has severe language difficulties and that his auditory processing impacts him greatly. She believes that the small class size is extremely important to ___. He gets one-on-one attention. He does not have conflicting noises and distractions that could go on in a larger classroom. She

indicated that ___ being with other disabled students actually worked to his advantage insofar as his self-esteem and being able to take on a leadership role in some situations.

50. Ms. Clough testified as to how the Brehm team teachers are implementing strategies in order to accommodate ___ in classes which are particularly difficult for him, such as math, science, and some parts of the social studies program. The witness also indicated that ___ is not having trouble in completing his homework.

51. Holly Pohlod testified. She has a bachelor's and a master's of science in speech communication. She gives language services to the students at Brehm and does diagnostic work. She has worked with ___. She reviewed a test of language competence which evaluated ___. The test indicates that he has severe receptive and expressive language deficits in social situations.

Ms Pohlod testified that in her opinion, ___ needs speech therapy at least twice a week, 50 minutes per session, and one 50 minute session of group language therapy. She testified that she has made progress with ___ in that he has increased his vocabulary and will submit when he does not know the meaning of a word which he did not do at first. On the Brehm rating scale from 0 to 5, he has progressed from 1 on the scale to 2 or 3 in some instances. The rating scale measures vocabulary. The witness also describes several other strategies that she is using concerning facilitating auditory processing. ___ paraphrases back what has been said to him or what he has read. ___ has gone from 1 on the rating scale to between 2 and 3. Ms. Pohlod also checks with his classroom teachers who provide her information concerning any problems he might be having in their class. Ms. Pohlod checks with ___ to improve his skills.

CONCLUSIONS OF LAW AND DECISION

53. ___ did not receive a free appropriate public education (FAPE) at the Perry County R-32 School District because:

- a) Perry County failed to diagnose his significant to severe central auditory processing deficits and thus, for the most part, the goals and particularly the short term objectives did not address his needs.
- b) The short term objectives were not written in measurable terms and one could not determine how much academic progress he was making.

c) The Present Level of Educational Performance in both 1995-96 and 1996-97 IEPs was not written so that one could tell at what grade or age level ___ was performing. Consequently, one could not determine from one IEP to the next how much progress ___ had made.

d) The District had absolutely no documentary evidence of any progress ___ had made not only during the 1995-96 and 1996-97 school years but at anytime except for the school year 1992-93. The District continued, to write the same or similar goals and objectives year after year and showed no significant change in goals or objectives. The District's witnesses believed was making progress and that he was receiving an educational benefit; however, the Panel concludes the District fell far short of any credible evidence which established that ___ received an educational benefit in either the 1995-96 or 1996-97 school year.

54. The Panel finds and concludes that there was no concerted effort by ___ IEP team to address his problems. There was very little communication between ___ L.D. teacher and ___ regular classroom teachers. Those teachers were left on their own to implement strategies for ___ without the benefit of guidance from an appropriate IEP and proper coordination from ___, L.D. teacher.

55. The Panel concludes that during the last two years became increasingly frustrated with his inability to do his homework assignments. The Panel credits the parents' testimony and their description regarding ___ frustration and the fact that he ultimately stopped bringing homework home and gave up. In their desperation, ___ parents sought help for him outside his public school environment and took him to a private learning center called the Sylvan Learning Center for well over a year. testified that she drove ___ to Sylvan after the regular school day, twice a week where he received services which seemed at least to help him raise his self-esteem which he was steadily losing in his last two years at Perry County 32.

56. Fortuitously, the ___ were put in touch with Dr. Brown, an audiologist and specialist in the area of central auditory processing. She testified that ___ has severe central auditory processing deficits. She further testified that a rather simple 15 minute test identified as a SCAN test would have alerted the District to the probability that ___ disabilities were different than those diagnosed. The District officials and employees who testified at the hearing admitted that they were familiar with the SCAN test to different degrees. Ms. Hemmann, Director of Special Services for the first several years that was served by the District, testified that she was personally familiar with the SCAN test and some District students had been tested and evaluated for central auditory processing deficits. Such evaluation, she said, had been outsourced to Southeast Missouri University. Therefore, the Panel concludes that the District could have and

should have diagnosed ___ central auditory processing deficits, but it failed to do so and consequently failed to write a meaningful IEP which would have been calculated to confer an educational benefit upon ~ consistent with Board of Education v. Rowley, 458 U.S. 176 (1982). The Panel concludes that the District did not fulfill the requirement of providing ___ a FAPE "by providing personalized instruction with sufficient support services to permit ___ to benefit educationally from that instruction." Rowley, 458 U.S. at 203. To the contrary, the Panel concludes that in the area of support services, the District reduced ___ speech/language and O.T. services between 1995-96 and 1996-97 when they should have been increased. Both Dr. Brown and witnesses from the Brehm School testified that such support services should have been increased substantially.

57. The District argues that even if it failed somewhat in providing ___ with a FAPE, nevertheless the ___ must fail in their claim that the District pay for ___ tuition at the Brehm School because the ___ failed to give timely notice to the District that they were unilaterally placing ___ at Brehm and that Brehm, because it does not teach non-disabled students, fails to satisfy IDEA's requirement that children be taught in the least restrictive environment. With regard to its first argument, the District says that the ___ failed to share Dr. Brown's evaluation with the District and that they failed to give the District an opportunity to implement Dr. Brown's recommendations. Factually, the District is correct, and this was somewhat troubling to the Panel because there is no evidence that the District refused or would have refused to implement Dr. Brown's recommendations and

to make appropriate revisions to IEP in order to address ___ central auditory processing deficits. That does not mean necessarily that the ___ claims should be rejected. The amended IDEA states in part:

" (ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied-

(I) if- ...

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa). n § 1412 (a)(10)(C)(ii) and (iii).

The Panel notes in the first place that failure to give timely notice of a unilateral placement invests the Panel with discretion in determining whether or not to rule in favor of the ___ for all or part of their claim. In granting such discretion to the panel, the amended IDEA has limited the applicability of Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988) and other cases cited by the District for its position because they interpreted IDEA prior to its amendment. Moreover, the amended IDEA provides:

" (iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if-

(IV) the parents had not received notice, pursuant to Sec. 1415, of the notice requirement in clause (iii)(I)." § 1412(a)(10)(C)(iv)(IV)

Mr. Parenteau, the District's current Director of Special Services, forthrightly admitted that the District failed to give the ___ such notice.

The analysis does not end there, however. Amended IDEA provides that the cost of reimbursement may be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." § 1412 (a)(10)(C)(iii)(III). The failure of the District to give the notice required by subsection (iv)(IV), set out above does not restrict the Panel's analysis of any "unreasonableness" on the part of the ____ . Their actions require analysis.

As stated above, the Panel is somewhat troubled by the fact that the ~ failed to share Dr. Brown's evaluation concerning ___ central auditory processing deficits with the District. It is clear from the evidence that most of her recommendations could have been implemented by the District and there is nothing in the record which leads the Panel to believe that the District would not have made the effort. The Panel finds in that regard that the District personnel were all people of good will (even though they failed in their responsibility to ___ . It may be that counsel for the ~ believed that it was unnecessary from a strategic standpoint to share that information. On the other hand, the Panel sympathizes with the pain and frustration the ___ undoubtedly felt

for the last two years was a student in the District. They saw their son losing self-esteem, crying, and unable to do his homework even though great effort was made. ability to help their son. They lost confidence in the District's That seems obvious from the fact that for more than a year prior to placing ___ in the Brehm School they took him to the Sylvan Learning Center for additional academic and psychological services. Based upon such lost confidence, it is not surprising that the ___ felt they should turn to private placement immediately so as not to lose more valuable time in educating their son. Upon final analysis, the Panel majority does not believe that the ___ actions were so unreasonable so as to limit their claim.

58. Next, the District argues that the ___ claim should be denied because ___ placement at the Brehm School is a restricted placement and Brehm only educates students with varying degrees of learning disabilities. Such placement, the District argues, does not comport with congressional intent that a student be educated in the least restricted environment where he can receive an adequate educational benefit. However, the District has not cited the Panel to one case which holds that an otherwise appropriate private placement is unsupportable on the basis of least restrictive environment where the public school district has failed in its responsibility to provide a FAPE. The Panel credits the testimony of the witnesses from the Brehm School that ___ placement is appropriate. In so ruling, the Panel is persuaded by the testimony of ___ parents and his teachers at Brehm that his self-esteem is improving, he is now enjoying his educational experience, not dreading it, and he is making measurable progress.

59. Although the Panel finds that the District failed in its duty to provide a FAPE and that ___ placement at the Brehm School is appropriate, we do not believe that ___ should be left there indefinitely at public expense if the District is capable of providing an appropriate education which will confer an educational benefit upon ___ and help him to develop academically, socially, and emotionally. The Panel believes that the District has the capacity, now that _ deficits have been appropriately diagnosed, to satisfy its obligations to ___. However, the Panel admonishes the District that it cannot and must not leave the creation of ___ IEP to individuals. There must be a collaborative effort, a true team approach so that ideas, strategies, and modifications for _ IEP can be shared and developed properly. _ regular classroom teachers ought to be included so that they are more fully aware of ___ needs and can implement classroom strategies more effectively. ___ team leader needs to do a much better job of coordination and communication with the various members of ___ team. Importantly, ___ IEP must properly evaluate his current level of educational performance so that it is meaningful and measurable to someone unfamiliar

with ___. Furthermore, ___ short term objectives must be written in a more precise and measurable manner so that if they are achieved one can tell how far he has advanced.

Accordingly, it is the decision and order of the majority of the Three Member Due Process Panel that:

1. The Perry County R-32 School District shall reimburse Mr. and Mrs. ___ for the full amount of the academic, including supporting services, and boarding costs for ___ at the Brehm School during the 1997-98 school year.

2. The Perry County R-32 School District shall make arrangements without delay to fully re-evaluate ___ and prepare an IEP which can be implemented starting with the beginning of the 1998-99 school year. In doing such re-evaluation, the District should have the benefit of Dr. Brown's evaluation.

APPEAL PROCEDURE

PLEASE TAKE NOTICE THAT THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION CONSTITUTE THE FINAL DECISION OF THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION IN THIS MATTER.

PLEASE TAKE FURTHER NOTICE that you have a right to request review of this decision pursuant to the Missouri Administrative Procedure Act, Section 536.010 et seq. RSMo., specifically, Section 536.110 RSMo. which provides in pertinent part as follows:

"1. Proceedings for review may be instituted by filing a petition in the Circuit Court of the county of proper venue within 30 days after the mailing or delivery of the notice of the agency's final decision

3. The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence"

PLEASE TAKE FURTHER NOTICE that, alternatively, your appeal may be taken to the United States District Court for the Eastern District of Missouri in lieu of appeal to the state courts. 20 U.S.C. § 1415.

Entered this 5th day of June, 1998.

GEORGE J. BUDE, Chairperson

KAREN ASLIN, Panel Member

Copies of the foregoing mailed to:

Ms. Katherine M. Black, Counsel for Parents

Ms. Teri B. Goldman, Counsel for School District

DISSENTING VOTE FOR ___ V. PERRY CO 32

In the matter of ___ v. Perry Co. 32 School District, I, Karen Aslin, respectfully dissent to the decision made by the three member due process pane.

Specifically, I disagree with the decision that Perry Co. 32 should reimburse Mr. and Mrs. ___ "for the full amount of the academic, including supporting services, and boarding costs for ___ at the Brehm School during the 1997-98 School Year."

My reasons are as follows:

1. The parents did not share with the school district the evaluation of ___ completed in 6-97 by Dr. Brown.
2. In October, 1995, ___ was reevaluated. The WISC III indicated that ___ had a verbal I.Q. of 74, a performance I.Q. of 57, and a full scale I.Q. of 63.

The diagnostic team determined, after discussing the results of ___ tests and previous tests, and the adaptive behavior score, that ___ was more appropriately classified as "borderline". Also, according to Ms. Hemmann's testimony, ___ was not diagnosed mild mentally retarded because under the Missouri State Plan, the student must "display adaptive behaviors consistent with cognitive ability." His adaptive behavior scores were in the average range.

3. The short term objectives written in the 1995-96 and 1996-97 IEPs were written in measurable terms.

4. Dr. Brown testified that the related services on both the 95-96 and 96-97 IEPs were deficient as far as the amount of time allotted for speech language, and occupational therapy. And yet, Brehm did not offer O.T. services at all. And only offered 50 min/wk language instead of the 150 min/wk suggested by Dr. Brown.

5. The IEP that was written in October 1995, was written by the IEP team, consisting of the LD teacher, the mother, and the assistant principal. According to DESE, the district may designate anyone who has the authority to make program decisions and not be vetoed by someone in higher authority. In some districts, this person could be a principal, an assistant principal, a counselor, etc. They do not need to be certified in special education. They would have the authority to supervise the provision of special education.

Therefore, I conclude that because of the above facts, and because it is my belief that the ___ failed to share the evaluation information and recommendations made by Dr. Brown; and because the ___ failed to notify the district that they were removing ___ from Perry Co. 32 Schools and unilaterally placing him in a private school, the Perry Co. 32 District is not responsible for the full amount of the academic, related services, and boarding costs for ___ at Brehm School during the 1997-98 school year.

I do agree that Perry Co. 32 School District should make arrangements without delay to fully reevaluate ___ had prepare an appropriate IEP which can be implemented starting with the beginning of the 1998-99 school year.

Respectfully Submitted,

Karen Aslin