

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Hartford Board of Education v. Student

Appearing on Behalf of the Parent: Attorney Gwendolyn K. McDonald
Office of Protection and Advocacy
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Hartford, CT 06120

Appearing on Behalf of the Board: Attorney Ann Bird
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City of Hartford
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Appearing before: Attorney Gail K. Mangs, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Has the school district provided an appropriate program?
2. If not, can a program such as CREC Riverstreet School provide an appropriate program?

PROCEDURAL HISTORY:

This hearing was requested by the school district on December 31, 2003. The initial request was for an interim alternative educational setting which requires an expedited hearing. On January 6, 2004, the hearing request was amended to request permanent placement of the Student in a private special education setting with placement in an interim off campus tutorial program pending completion of the hearing. Therefore, the hearing no longer qualified under the state regulations as an expedited hearing. The prehearing conference convened on January 7, 2004. Hearing dates were set for January 20, 27, 30 and February 4, 2004 and briefs were scheduled for receipt on or before February 16, 2004. A postponement of the date for the mailing of the final decision and order was granted; the new date was set for February 27, 2004. During the course of the hearing, February 3, 2004 was added as a hearing date. The hearing officer issued an

interim order on the record rejecting an interim placement for the Student. The following witnesses were called by the school district: Tyler Fovel, a behavior analyst retained as a consultant by the school district; Jody Lefkowitz, school district Senior Director for Exceptional Children; Lisa Giarratana, the Student's seventh grade special education teacher; and Judianne Coster, the Student's speech and language pathologist. The Mother called the following witnesses: Tyler Fovel; Jody Lefkowitz; Elizabeth Daly, Program Director of the Office of Protection and Advocacy; the Student's Mother; and Janette Johnson, consultant from the Benhaven Learning Network. The school district called the following witness for rebuttal testimony: Renee DeLuke, school district occupational therapist; Anne Arcata, school district staff developer; Jill Cutler Hodgman, school district labor relations manager; and Jody Lefkowitz.

SUMMARY:

The Student, who is now 13 years old, has been a student within the school district since the 1998-1999 school year. He is identified as a student with autism. Since entering the school district, he has demonstrated disruptive and sometimes aggressive behaviors. As he has become older, and grown quite large for his age, his behaviors have become more difficult to control. The school district has retained consultants to assist in formulating behavior intervention plans and train staff and has provided occupational therapy, social work and speech and language services. At times, the Student has been moderately successful in learning to control his behavior and in making academic progress. However, during the 2003-2004 school year, the Student's first year in middle school, the Student has demonstrated more aggressive and assaultive behavior culminating in an episode on December 4, 2003 in which he punched one of his teachers in the face. The school district recommended an off campus tutorial program until the Student could be placed in an out of district placement; this plan was rejected by the Student's Mother.

FINDINGS OF FACT:

1. The Student was born on January 6, 1991. He entered the school district during the 1998-1999 school year with a history of language delay, hyperactivity, attentional problems and oppositional behaviors. He was evaluated in December, 1998 during an admission to the Partial Hospital Program at the Institute of Living which was precipitated by ongoing behavioral problems at home and at school. It was concluded that the Student met diagnostic criteria for Attention Deficit Hyperactivity Disorder and Autistic Disorder. (Exhibit B-1)
2. During the 1998-1999, 1999-2000 and part of the 2000-2001 school years, the Student was placed in a classroom for children with autism where he made slow, steady progress on his IEP goals. During the spring and fall of 2000, the Student's behavior began to deteriorate; he frequently threw objects, ran out of the classroom and hit peers. He was suspended twice during the fall of 2000 for physically aggressive behavior. In December, 2000 the PPT placed the Student in the school district's therapeutic school for children with serious emotional disturbance. The Student's behavior difficulties continued in this placement. (Exhibit B-2)

3. During the triennial assessment administered in April, 2002, the WISC-III was administered; the Student achieved a verbal score of 67, a performance score of 117 and a full scale score of 90 (average range). On the Test of Nonverbal Intelligence-3, the Student achieved a score of 98 (average range). On the WIAT, the Student's reading score fell at the 4.2 grade equivalent level; the mathematical reasoning score fell at the 1.9 grade equivalent level, and the spelling score fell at the 2.9 grade equivalent level. Social-emotional rating scales indicated that the Student was exhibiting high levels of disruptive behavior, attentional problems and poor social skills. He frequently misinterpreted social situations and often reacted to perceived conflicts with verbal and physical aggression. The evaluator recommended identifying the Student as having autism and stated that his educational program did not seem to be meeting his needs. (Exhibit B-2)

4. At the request of the school district, Janette Johnson observed the Student on August 17, 2002 and made recommendations. Her recommendations included the following: a sensory plan ("sensory diet") with sensory activities interspersed during the day to help the Student modulate his level of arousal; teaching the Student escape communication so he can request a break in order to appropriately interrupt and end a stressful situation without engaging in negative behaviors; teaching coping strategies, anger management skills and a deep breathing relaxation protocol; the use of social stories and a visual schedule; the use of a self-monitoring check-off sheet with a reward system; and a comprehensive behavioral support plan within a school environment that provides one to one support with a trained paraprofessional and time with typical peers. (Exhibit B-3)

5. An Occupational Therapy assessment was performed on August 26, 2003. The occupational therapist concluded that the Student had abnormal sensory processing in the areas of auditory, visual, touch and multi-sensory areas. He is sensitive to loud noises, has difficulty processing tactile input and a poor sense of where his body is in space (often bumping into people and walls). He is not afraid of heights yet has difficulty climbing stairs. A sensory diet was recommended as an essential part of the Student's daily routine in order to help him maintain alertness without being either over or under aroused. Regularly scheduled gross motor activities as well as scheduled quiet times were recommended as was a quiet workspace free of auditory and visual distractions. It was also recommended that the sensory diet be put in place at school as well as in the home. (Exhibit B-4)

6. The Student was placed in a self-contained classroom within one of the school district's elementary schools for the 2002-2003 school year (sixth grade). The Student had a male teacher, Todd Miller, and a female paraprofessional, Sandy Burgos, assigned to him; the classroom also had eight students, a classroom paraprofessional and an additional paraprofessional assigned to another student. The record contains descriptions of four separate behavior incidents during October, 2002. In two of these incidents, paraprofessionals were punched or kicked by the Student. The incidents seemed to begin when the Student was asked to do something he did not want to do (begin an assignment, cease yelling in the cafeteria); one incident resulted in physical restraint and suspension of the Student. Two incidents occurred on the school bus during which the Student

kicked the bus driver; the Student received a suspension for one of the bus incidents. (Exhibits B-5, B-6, B-7, B-8, B-9, B-10)

7. Janette Johnson again observed the Student on October 16, 2002. Her report repeated the same recommendations that were made after her first observation and also stated that the Student's teacher seemed capable and caring but in need of support to implement strategies. (Exhibit B-11)

8. Tyler Fovel, an autism consultant retained by the school district to address the behavior problems of several students, met with Todd Miller and Sandy Burgos during October, 2002. Mr. Miller already had a behavior plan in place based upon Janette Johnson's recommendations. Tyler Fovel worked with Mr. Miller and Ms. Burgos to develop strategic interventions to decelerate troublesome situations and reinvolve the Student with classroom activity. Despite this planning, behavioral incidents occurred in November, 2002. During one incident, the Student dialed 911 and had to be restrained to avoid another 911 call. While being restrained, the Student attempted to kick, punch and bite the paraprofessional and teacher. During the other incident, the Student became frustrated with his work and began to throw objects. The other students had to be removed from the classroom while the Student was restrained for 10 to 15 minutes during which he screamed, cried and attempted to bite, hit and kick his teacher and paraprofessional. In early December, Ms. Burgos was accidentally injured during another behavior incident involving the Student. She was transferred to another position. (Exhibits B-12, B-13, Testimony of Tyler Fovel)

9. A PPT was convened on December 10, 2002 to review the Student's IEP and discuss Janette Johnson's recommendations. The team recognized that frustration seemed to be a trigger for the Student's negative behaviors. The Student's Mother noted that physical restraint triggered some of these behaviors that often resulted in the other students being removed from the classroom to ensure their safety. The Student's teacher skillfully used de-escalation strategies including redirection and use of the sensory protocol provided by the occupational therapist although safety of the students and staff remained a concern. The PPT agreed to revise the Student's behavior intervention plan. (Exhibit B-14)

10. On December 13, 2002, another behavioral outburst occurred when the Student was asked to choose an activity other than the computer (a favored activity). The Student began throwing furniture, kicked and hit staff and threatened to kill his paraprofessional. It took three adults to restrain the Student and approximately 45 minutes for the Student to calm down. He received a 10 day suspension. (Exhibit B-15)

11. The Student's ongoing behavioral issues were discussed at PPT's convened on January 2 and January 13, 2003. The Student's teacher was then out on medical leave due to stress from working with the Student. The Student's sensory diet was reviewed; the plan had been in use since September, 2002 and included use of a therapy ball, fidget toy, deep pressure activities, headphones, a weighted vest and a quiet space. While a search for a male paraprofessional to support the Student was underway, the PPT recommended an out of district placement to address the Student's behavioral needs; the Student's Mother did not agree with such a placement but was willing to visit other

programs. In the meantime, the PPT agreed to have Janette Johnson and Tyler Fovel meet with school staff to assist with implementation of the behavior program. During January, 2003, Mr. Fovel spent several mornings in the classroom with the Student and revised the behavior plan. He also trained the new paraprofessional, Ruben Arroyo. (Exhibits B-17, B-18, Testimony of Tyler Fovel)

12. Tyler Fovel has a master's degree in applied behavior analysis. He consults with school districts and families and provides educational and behavioral services to children with autism and pervasive developmental disorder. Between October, 2002 and June, 2003, Mr. Fovel observed the Student about 12 times. He also worked with the Student during the summer of 2003. Janette Johnson has a master's degree in psychology and has worked with Benhaven's Learning Network since 1992 providing consulting services to assist individuals with mental retardation, autism, mental illness and severe challenging behaviors. (Exhibits B-41, S-1, Testimony of Tyler Fovel, Janette Johnson)

13. The record contains descriptions of behavioral incidents on January 14 and 16 and February 4, 2003. One incident occurred in the art room after which the art teacher wrote, "[The Student] explodes without warning. It is very difficult to control him while he is throwing furniture. He is a grave danger to other children, paraprofessionals and teacher. Dealing with [the Student] takes learning/teaching time of all other students...I am very fearful of the damage he can do..." One of the incidents required physical restraint. (Exhibits B-19, B-20, B-21)

14. The PPT convened on March 6, 2003 and agreed that the Student's behavior plan needed to be revised again. Tyler Fovel revised the behavior program on March 18, 2003. (Other revisions had occurred on January 14, February 20 and 25, 2003.) The program included strategies to increase positive behaviors and engagement with and completion of school work. Such strategies included keeping school tasks short and not too difficult and giving the Student lots of opportunities to answer questions during group activities. Strategies to decrease problem behaviors included use of a self-monitoring checklist ("I asked for help...I asked for a break...I used a calm voice...I was in control...") and deep breathing relaxation procedures. The program also included a step by step description of appropriate staff responses to potential behaviors by the Student. Mr. Fovel met with Janette Johnson during March, 2003 to review the revised behavior plan; she was satisfied with the program. (Exhibits B-22, B-23, B-24, Testimony of Tyler Fovel)

15. The PPT convened on April 22 and June 11, 2003 to review the behavior program and plan for the Student's transition to the middle school for the 2003-2004 school year. The Student's teacher and paraprofessional reported that the revised behavior plan had resulted in a reduction in the frequency and duration of negative behavior incidents as well as modest academic progress. A sensory diet that included use of a therapy ball, beanbag chair, deep breathing, a weighted vest, fidget toy, and stretching to take breaks continued to be used. The PPT agreed to place the Student in the middle school in a self-contained special education classroom with one on one paraprofessional support for the 2003-2004 school year; mainstream inclusion would be provided for lunch, recess and some specials depending upon the Student's tolerance. Social work services and speech

and language therapy were also a part of his program. Based upon the recommendations of an assistive technology evaluation, computer software, hardware and training would be provided. The PPT also planned for Tyler Fovel to meet in the fall with the Student's middle school teachers, related service providers, paraprofessionals and security staff to train them in the implementation of the behavior plan. Transition planning included having the Student's new teachers meet with him at his elementary school and having the Student visit the middle school. (Exhibits B-24, B-26, S-2)

16. While the Student's behavior was noticeably better during the spring of 2003, there is a question as to whether he was just being contained and kept under control by allowing him to engage only in favored activities such as the computer. While he successfully produced more academic work, academic demands had been significantly reduced to ensure the Student's success. (Testimony of Jody Lefkowitz, Lisa Giarratano)

17. The Student's initial placement during his extended school year program (summer, 2003) was not appropriate. The children with whom the Student was placed functioned at a much lower level. The Student was aware of this and rejected the placement. A one on one, computer-based program was developed for the Student with Ruben Arroyo. While this program was successful in that the Student made some academic progress, a behavioral incident occurred in which the Student threatened Mr. Arroyo and had to be physically restrained. (Testimony of Tyler Fovel)

18. The Student is very large for his age. His physical presence can be intimidating. His normal speech is also louder than average. (Testimony of Janette Johnson, Lisa Giarratano, Judianne Coster, Student's Mother)

19. The Student seemed to make a good transition to the middle school and his new teachers during the first weeks of the 2003-2004 school year. The self contained special education classroom is taught by two experienced special education teachers, Beth Ellison and Lisa Giarratano, who share the teaching position. There are nine students in the classroom four of whom have paraprofessionals assigned to them; Ruben Arroyo continued to serve as the Student's paraprofessional. The students receive academics within the classroom but go to mainstream settings for art, music, physical education, unified arts, lunch and special auditorium programs. The Student was initially motivated by being in a new school with new tasks, having his own computer and by his teachers' motivational point system. He was able to complete a reasonable amount of school work. By the end of the first couple of weeks, however, behavioral incidents were reported. During these incidents the Student kicked, hit and punched his paraprofessional and pushed furniture. Building security became involved and physical restraint was used. During at least one incident, police were called and the Student was brought to the hospital. The incidents were precipitated by events such as the Student becoming upset when he forgot his homework, becoming angry when he made a mistake while typing or because another student found a vocabulary word before he did. During another incident, the Student told his paraprofessional he was going to bring his brother's gun to school and shoot him. Similar behavior incidents continued during October, 2003. During all incidents, de-escalation techniques were used with varying degrees of success. A time-out room was also used although the room was in another building. Bringing the Student

to this room during his outbursts was difficult and presented safety issues to other students in the hallways at that time so the plan was modified to keep the Student in the classroom during his behavioral outbursts and have the other students go to the library with their paraprofessionals; this occurred several times a week. (Exhibits B-27, B-28, B-29, B-30, B-32, B-33, B-34, Testimony of Lisa Giarratano)

20. Lisa Giarratano testified that sometimes she could see the stress building in the Student and he could be talked down but other times, he would just explode; his behavior became unpredictable. Ms. Giarratano, Beth Ellison and Ruben Arroyo worked with Tyler Fovel to revise the behavior plan which they all implemented. Related service providers also received training from Mr. Fovel. During the late fall, 2003, after one of the Student's behavioral incidents in which Ruben Arroyo was injured, Mr. Arroyo stopped coming to school; he apparently left his job because he was overwhelmed by the physical and mental stress of working with the Student. Ms. Giarratano testified that the Student did well with easy academic work; but if the work was challenging, the Student might shut down, ask for a break or become agitated with the result that the Student's progress on academic goals and objectives was sporadic. To help the Student de-escalate when he became or threatened to become out of control, Ms. Giarratano and Ms. Ellison used talking, deep breathing, the weighted vest, rubbing and deep pressure. When the Student was calm, they used social stories and discussed escape strategies including asking for a break, taking a walk, and using the chart on his desk that reminded him to ask for a time out. The Student's unpredictable behavior and inability to handle little annoyances requires almost constant containment and de-escalation. Ms. Giarratano believes the school does not have the resources to meet the Student's needs. (Testimony of Lisa Giarratano, Judianne Coster)

21. A PPT was convened on October 4, 2003 to discuss the Student's program. The Student's Mother felt that the transition to the middle school had not been appropriately carried out. She was also upset because she had not yet received computer training. (This occurred later in the fall.) The PPT agreed to have Tyler Fovel meet with school staff and revise the Student's behavior plan. They also agreed to reduce the educational demands placed on the Student until revision of the behavior plan and staff training had occurred. (Exhibit B-31)

22. Tyler Fovel revised the behavior plan on November 20, 2003. Interventions that had been used were listed as follows:

- a. A predictable, consistent schedule was implemented and communicated both verbally and visually to the Student on a daily basis;
- b. The curriculum included as many preferred and meaningful activities as possible;
- c. Easy, preferred tasks followed more difficult tasks and difficult tasks were gradually introduced;
- d. The Student had the exclusive use of a computer;
- e. A meaningful motivational program was used that reinforced work completion and time without problem behavior;
- f. The Student was taught to ask for a break and to use words to get his teacher's attention;

g. The teacher and paraprofessional addressed problem behavior quickly, intervening with prompts to help the Student resolve the problem or redirect him;

h. The Student was taught relaxation techniques.

The revised behavior plan focused on the following:

a. Maximizing opportunities for reinforcement and engagement in school tasks;

b. Optimizing task difficulty to avoid making work unpleasant or provoking escape attempts;

c. Actively teaching strategies for coping with anger and frustration before the need arises; and

d. Supporting the Student with redirection and prompts to use coping strategies.

The revised behavior plan includes step by step descriptions of appropriate staff responses to the Student's outbursts and described the use of a visual schedule, rewards and the structuring of tasks to ensure the Student's success. The plan also includes data sheets to collect information on the behaviors to be decreased. At a PPT convened on November 20, 2003, the revised behavior plan was introduced and accepted for implementation. Tyler Fovel, who had been meeting with the Student's teachers, planned to meet with the Student's new paraprofessional and the middle school's security staff. He did not observe the Student during the fall of 2003. (Exhibits B-36, B-37, Testimony of Tyler Fovel)

23. On the afternoon of December 4, 2003, another behavior incident occurred. After being asked to use a different part of the chalkboard to avoid annoying another student, the Student became noncompliant. While his upper body was restrained, the Student kicked Judianne Coster who had entered the room during the commotion. While two security guards restrained the Student on the floor, Ms. Coster and the Student's teacher were able to calm the Student by encouraging him to take deep breaths and speaking with him softly. After the Student calmed down, his teacher and paraprofessional helped him prepare to go home. Taking some papers from Ms. Ellison's hand, the Student accidentally hit himself in the eye and then punched Ms. Ellison in the face. Ms. Ellison was traumatized by the attack and has not returned to her teaching position since the incident. (Exhibits B-38, B-42)

24. The PPT convened on December 22, 2003 for a manifestation determination meeting. The Student's Mother did not attend the meeting. There is some question as to whether the Student's Mother was appropriately notified about the meeting. The notice was mailed; a delivery confirmation confirms that the notice was left at the Mother's address. Telephone messages were also left at the Mother's place of employment; the Mother's home phone was not then in service. It appears that the message did not get to the Mother in time for her to attend the PPT; before this, the Mother had consistently attended PPT meetings. The Student's Mother did not request that the PPT reconvene because the school district requested a due process hearing soon after the PPT. The manifestation determination was not completed because the team determined that the IEP was not appropriate to meet the Student's needs. In order to maintain the safety of the Student, staff and other students, the PPT recommended that the Student be

placed in a small, special education setting with minimal transitions, few distractions and an intensive therapeutic component with off campus tutoring for ten hours a week pending the placement. (Exhibits B-39, S-4, Testimony of Anne Arcata, the Student's Mother)

25. Tyler Fovel described the following as essential to a successful program for the Student: 1. A male paraprofessional; 2. A motivational reward system (computer time, certain games, social time with certain children); and 3. Competent interveners who can successfully redirect the Student. He also noted that the following will often upset the Student: 1. The absence of a teacher or paraprofessional; 2. A change in the Student's schedule without warning; 3. Unexpected things such as a loud noise; and 4. Any inability on the part of the Student to meet his own level of perfection. Therefore, a successful behavior plan must help the Student to deal with stressors and decrease negative behaviors as well as increase his ability to tolerate a normal schedule and appropriate academic demands. (Testimony of Tyler Fovel)

26. A male paraprofessional cannot always be assigned to the Student within the school district due to the contract with union bargaining unit to which the paraprofessionals belong. Security staff at the school has been trained in physical restraint including safe physical holds and de-escalation techniques but there is no way to train everyone who may come in contact with the Student. (Testimony of Jody Lefkowitz)

27. The Student's Mother testified that the Student is violent at school only when he is approached when he is upset (as he was on December 4, 2003) or, if he is physically restrained; any injuries he caused in those situations were accidental. She believes that if an appropriate behavior plan was implemented and if means of de-escalation other than restraint were employed, his behavior at school would be more controlled. The Student's Mother also testified that she can usually sense when a "meltdown" is coming although she cannot always predict when he will become frustrated. He is not violent at home and does not require restraint although he has thrown books and shoes when frustrated. Currently, the Student is medicated with seroquel and clonidine. (Testimony of Student's Mother)

28. Mr. Fovel believes that the Student's behavior has changed over time. While previous to the December 4, 2003 incident, the Student's behavior could generally be contained and anticipated, Mr. Fovel now sees his behavior as unpredictable; therefore, it is more difficult to successfully intervene before the behavior spins out of control. Mr. Fovel views the Student as having targeted the smaller, weaker of his two teachers during the December 4, 2003 incident. Mr. Fovel sees the public school environment as incapable of dealing with the Student's new, more aggressive and intentional behaviors. He believes the Student needs an environment where he has the opportunity to work on an individual basis as well as in small groups; where his academics contain some functional elements; where he has a one to one paraprofessional; and where behavior supports are supplied by all staff members who are trained to physically intervene when necessary and are supervised by well trained behavior consultants. In a public school, the Student cannot be safely controlled in all situations including passing in the hallways, classroom transitions and waiting for the school bus. While the Student could be safely

placed alone in a room with a trained teacher and paraprofessional, this would be placing safety above his educational needs. (Testimony of Tyler Fovel)

29. Janette Johnson testified that the Student's sensory issues and inability to self-calm require a sensory diet, weekly or twice weekly behavioral consultation, and the direct training of all staff. Such training should include the role-playing of interventions, teaching strategies and restraints. During a behavior episode, she supports the use of one lead adult to be the only person talking to the Student; the involvement of too many people may be counter-productive. Ms. Johnson believes that the current behavior plan is lacking in that anger management strategies are not fully explained and there are no data sheets to show whether the Student is learning positive behaviors. From her review of the records, she was uncertain if a comprehensive behavior support plan with proactive strategies was in place and being used in September, 2003. The use of proactive strategies would make reactive strategies less necessary (although even then, according to Ms. Johnson's testimony, violent episodes could still occur). Ms. Johnson emphasized the need for elements of the transition to have been in place before the Student entered the middle school: a quiet room, a safe place for retreat, staff training and a sensory plan should all have been completed and ready before school began. Ms. Johnson sees the spring of 2003 as a relatively successful time for the Student and as an indication of his ability to be successful in public school. She would place the Student out of district only if a program similar to that used during the spring of 2003 was appropriately tried and was unsuccessful. (Testimony of Janette Johnson)

30. The Riverstreet School is run by the Capitol Region Educational Council and serves students with academic needs similar to the Student's. Janette Johnson testified that many of the students at Riverstreet have autism and mental retardation. (Testimony of Jody Lefkowitz, Janette Johnson)

CONCLUSIONS OF LAW:

1. The parties do not dispute that the Student is eligible for a free and appropriate public education ("FAPE") with special education and related services as set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sec. 1401, et seq. and the Connecticut General Statutes Sections 10-76 et seq.

2. The standard for determining whether a school district has provided FAPE 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). First, it must be determined whether the school district complied with the procedural requirements of IDEA and second, there must be a showing that the individualized educational plan ("IEP") is reasonably calculated to enable the child to receive educational benefit. The requirement of FAPE 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. This standard of educational benefit, however, contemplates more than trivial advancement. (Mrs. B. ex rel M.M. v. Milford Board of Education, 103 F.3d 1114 (2d Cir. 1997))

3. The IDEA also requires that children with disabilities be educated, to the maximum extent appropriate, in the least restrictive environment (“LRE”) and are to be removed from regular education only when “. . .the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (34 C.F.R. Section 300.550) In order to meet this requirement, school districts must “. . .ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” (34 C.F.R. Section 300.551(a)) These alternative placements include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. Section 300.551(b)(1)) Thus, the statutory scheme contemplates that there are situations, as the school district proposes here, where students with disabilities may require an out of district placement if they are to receive FAPE.

4. Meeting the Rowley tests is not dispositive of whether the LRE requirement has been met. Post-Rowley case law has developed further analyses to assist in determining whether a student has received FAPE in the LRE. While the applicable case law focuses on the extent to which a student can be educated in the mainstream, the analyses are instructive here, where the issue is in-district versus out of district placement. Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989) and Oberti v. Board of Educ. 995 F.2d 1204 (3rd Cr. 1993) both looked at whether a school district has provided appropriate supplementary aids and services in determining whether a student could be satisfactorily educated in the mainstream. In making this determination, Oberti considered the following: 1. whether the school district has made reasonable efforts to accommodate the child in a regular classroom; 2. a comparison of the educational benefits of regular classroom placement with appropriate supplementary aids and services versus the benefits of a more restrictive placement; and 3. the possible negative effects of the child’s placement on the other students in the class. A similar analysis can be undertaken here.

5. The Mother believes that the Student has not received the appropriate supplementary aids and services necessary to maintain the Student in the public school. In particular, she argues that the behavioral intervention plan and its many revisions were inappropriate and that all teachers, related service providers and other adults who came in contact with the Student were not properly trained to implement meaningful behavior supports. She believes that with the appropriate behavior supports, the Student could be successfully educated in the public school, which she views as the LRE appropriate for him.

6. The school district has made reasonable efforts to accommodate the Student within the public school. For the 2003-2004 school year, the Student was placed in a classroom with nine students and six adults; he had almost constant individualized attention. He began the school year with a behavior plan that was considered to have been relatively successful. He had a paraprofessional assigned to him that he knew, who knew him very well, and who had been extensively trained by an experienced behavioral consultant (Tyler Fovel). The Student had two experienced special education teachers and a program that included a sensory diet, social work services and speech and language therapy. His teachers met with Tyler Fovel to discuss the Student’s behavior issues and

were well versed in the behavioral plan and its implementation (see finding of Fact No. 22). In addition, they had the assistance of Ruben Arroyo who had experience with the Student and knowledge of which strategies had worked and not worked in the past. When the Student was calm, his teachers used proactive strategies such as their motivational point system, social stories and they taught the Student escape communication and strategies including asking for a break, taking a walk, and using the chart on his desk that reminded him to ask for a time out. When he became or threatened to become out of control, Ms. Giarratano and Ms. Ellison used talking, deep breathing, the weighted vest, rubbing and deep pressure to de-escalate the situation. On the advice of Mr. Fovel, the Student's teachers also decreased their academic demands on the Student to lessen his feelings of frustration. The middle school also had a security staff that had been trained in restraint and de-escalation (although not specifically for the Student). The school district has taken the appropriate steps to accommodate the Student.

7. Despite these steps, the Student continued to demonstrate behavior that was dangerously hard to control. His aggressive and assaultive behavior threatened the safety of staff, students, and himself. His behavior led to two teachers taking leaves of absence (Todd Miller and Beth Ellison) one paraprofessional quitting (Ruben Arroyo) and another paraprofessional being reassigned (Sandy Burgos). The education of the other students in the classroom was also disrupted either because the Student had a behavioral meltdown and they were removed from their classroom, or because so many adults were needed to contain him. Clearly, the Student's presence in the classroom had a negative effect on the other students.

8. More importantly, the Student's presence in the public school is having a negative effect on him. Not only is his behavior control not improving, but he is not making the educational progress of which he is capable. Much of his acting out occurs when he is frustrated by new academic demands. In order to maintain his behavioral stability, academic demands have been decreased. While understandable and apparently necessary at times, this certainly makes the provision of a FAPE problematic.

9. Undoubtedly, the school district has not provided a perfect program for the Student. Elements of an appropriate program are missing. The Student's Mother was not provided with parent counseling/training nor did she receive computer training until late fall. It is unclear, however, how these could have significantly impacted the Student's behavior in school. Tyler Fovel did not observe the Student in the fall nor did he provide staff training at the beginning of the year. However, by September, 2003, Mr. Fovel knew the Student quite well and was capable of advising an experienced staff without direct observation. In addition, the staff, including related services personnel and security, had received training in de-escalation for other students and began the year with an understanding of the Student's behavior plan, a plan with which he had experienced some success. The time out room was too far away; but when this became clear, the Student's teachers dealt with his behavior issues in the classroom. While this certainly disrupted the education of the other students, the Student did have the opportunity to be in a quiet space. It is unclear if all elements of the plan for the Student's transition to middle school took place. It appears that all pieces may not have been in place, but the Student's early success in the middle school program speaks to a transition plan that was at least

passable. Therefore, while the program was not perfect, it provided appropriate supports. Even with those supports, however, the Student was unable to be successful.

10. What the Student does require is a program and placement that will allow him to make educational progress in the least restrictive environment. Such an environment should have small classes, minimal transitions, few distractions, provide strong academics including functional skills, a physical layout that allows for small classes, spaces for quiet time and individual and one on one work, and have a well-trained staff so that everyone with whom the Student will come in contact is qualified to provide appropriate behavioral interventions. This is not possible in a large public school. There will be noise, distractions, cumbersome spaces and transition periods such as waiting for school buses and passing in the hallways that require contact with many students and staff. In addition, it is not always possible to provide the kind of paraprofessional support the Student requires in a public school (male) nor is it possible to train everyone to provide appropriate behavioral interventions in a large school with several hundred staff members. While the Student's behavior could probably be controlled in a space within a public school environment that provided a myriad of supplemental aids and services, paraprofessionals and few to no distractions, such an environment would be far more restrictive than what could be provided in a special education school such as Riverstreet where the total environment is geared to supporting children such as this Student.

11. Janette Johnson testified that the moderate success of the behavioral program implemented in the spring of 2003 was evidence of the Student's ability to be successfully educated in the public school. She also stated that only if an appropriate behavioral program was in place and the Student's behavior was still an issue, would she recommend an out of district placement. First, while the Student experienced more behavior control during the spring of 2003, it appears that this was at the expense of providing him with any academic challenge. It also was the result of allowing him to spend much of his time in preferred activities. Second, the program provided in the fall of 2003 was, as previously discussed, not perfect in every respect, but it did provide most of the elements of the program recommended by Janette Johnson. A sensory diet was in place and used proactively by the Student's teachers. Behavioral consultation and staff training had occurred (albeit not as frequently as Ms. Johnson advised) and the behavioral plan incorporated many of the recommendations that she had made after observing the Student. Finally, the level of support advocated by Ms. Johnson is so extensive that it makes far more sense for the Student to receive the supports he needs in a specially designed special education school environment. For, as Ms. Johnson testified, even if all aspects of the program she envisioned were put in place, violent episodes could still occur.

12. The Student's Mother testified that her son presents few of the behavioral problems at home that he presents at school. She does not have to restrain him at home and successfully allows him to calm himself after a behavioral upset. But a public school is not expected to replicate a home environment. What may be possible at home, where there are few people and distractions, and noise and transitions are more easily controlled, is not always possible in a public school environment. However, it is easier

by far to replicate such an environment in a special education school that is totally geared for students who require such placements.

13. The Mother also claims that her absence from the PPT of December 22, 2003 is the result of a procedural violation on the part of the school district. It appears that school personnel made an effort to contact the Student's Mother. This was complicated by the fact that the home phone was not in service in the days prior to the PPT. There does not seem to have been any intention to exclude the Mother from this PPT. On the other hand, it is clear that she has been an involved and proactive parent throughout her son's educational career and would have attended the PPT if she had received actual notice. She testified that she did not request that the PPT reconvene as Due Process was requested shortly after the PPT; however, PPT meetings do and should go forward even if a Due Process hearing is pending. In any case, the school district should look at its notification procedures and ensure that every effort is made to notify parents of impending PPT meetings.

14. Having found that the school district has made an appropriate effort to provide the Student with a FAPE including appropriate supplementary aids and services, but has been unable to provide a successful program, an appropriate program and placement must be determined. Insufficient evidence was offered with regard to the Riverstreet program. It is impossible to determine whether Riverstreet can meet the Student's complex needs (or if he would be accepted there) although this is not to be construed as a determination that Riverstreet is not appropriate for the Student. Therefore, the PPT must convene to place the Student in a special education school that can meet his needs in an environment as described in Conclusion of Law No. 10 above. The PPT will include Tyler Fovel. The PPT team will also include Janette Johnson or, if she is not available, such other consultant as the Student's Mother shall select. The PPT shall reach a consensus as to the appropriate placement. If this is not possible, then Tyler Fovel and Janette Johnson shall together choose a third consultant who will make the final placement decision.

FINAL DECISION AND ORDER:

1. The School District has not provided an appropriate program to the Student.
2. The PPT shall convene to determine the appropriate placement and program for the Student as described in Conclusion of Law No. 14, above. The PPT shall convene within two weeks of receiving this decision and the placement shall occur as soon as possible thereafter.