

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Danbury Board of Education

Appearing on behalf of the Student: Attorney Jennifer Laviano
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Appearing on behalf of the Board of Education: Attorney Christine L. Chinni
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Appearing before: Attorney Christine B. Spak
Hearing Officer

FINAL DECISION

ISSUES:

Student's Issues:

1. Has the Danbury Board of Education [hereinafter, the Board] developed and implemented an appropriate program for the 2003-2004 and 2004-2005 school years, including related services and extended school year services for 2004?
2. Has the Board violated the Student's procedural safeguards, including failure to provide an agreed upon independent evaluation with Dr. Michael Powers.
3. If not, is the Board responsible for reimbursement of evaluations and services privately obtained by the Parent, and/or reimbursement for the unilateral placement of the Student at CCCD and/or compensatory education?

Board's Issue:

1. Should the Parent's recovery be eliminated or reduced due to her unreasonable conduct in this matter?

SUMMARY:

The Student who is the subject of this hearing was a three year old boy with multiple disabilities when he received special education and related services from the Danbury Public Schools for the period from February through July of 2004. He attended a public school program in Danbury during that period, after which his Parent unilaterally placed him in a private program exclusively for disabled students on the autism spectrum. The Board maintains that the program

they offered was appropriate for the Student and the Parent maintains that she made the unilateral placement because the Board's program was not appropriate.

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. S&H Computer Systems, Inc.*, 605 F. Supp. 816, (March 6, 1985) and *Bonnie Ann F. v. Callallen Independent School District*, 835 F.Supp.340 (S.D.Tex. 1993).

PROCEDURAL SUMMARY:

The parties convened on fourteen hearing sessions in this matter: 1/9/06, 1/13/06, 2/16/06, 3/16/06, 3/24/06, 4/4/06, 4/20/06, 5/4/06, 8/24/06, 8/29/06, 9/25/06, 10/12/06, 11/15/06, 11/21/06, 12/14/06 and 12/18/06. The Parent completed her case in chief on 3/16/06. The Board presented its case in chief on 3/24/06, 4/4/06, 4/20/06, 5/4/06, 8/24/06, 8/29/06, 9/25/06, and 10/12/06. Both parties offered rebuttal evidence on 11/15/06, 11/21/06, 12/14/06 and 12/18/06.

The following witnesses testified on behalf of the Board: Audrey Todd, Supervisor of Special Education; Donna Warner, Supervisor of Special Education; Greg Smith, Board-certified behavioral analyst and consultant; Dr. Ann Majure, educational consultant; Nonna Neal, certified special education teacher; and Joyce Emmett, Director of Special Education. The following witnesses testified on behalf of the Student: the Student's mother; Jill Castellani, a member of the staff of CCCD; Anita Breslin, a behavioral analyst; and Judy Palazzo, Clinical Director of CCCD. The Hearing Officer established a briefing schedule on December 18, 2006, whereby briefs were to be postmarked by February 15, 2007. Subsequently, the parties agreed to extend the date for postmarking of briefs to May 14, 2007 with the reply brief date extended to July 2, 2007 by agreement of the parties. On June 29, 2007 the parties advised that they had agreed not to submit reply briefs. This was over six months after the final date of hearing. The date for mailing of the final decision is August 29, 2007. All extensions and continuances in this matter were by agreement of the parties and granted without objection from either side in consideration of the undisputed fact that the Student had moved out of state before the hearing had begun.

FINDINGS OF FACT:

1. The parties agree that during the 2003-2004 and 2004-2005 school years, the Student was eligible to receive special education, including related services, through the Board. His primary identification was pervasive developmental delay, not otherwise specified, although the Parent did not agree with this identification and believed the correct identification was autism. At all times relevant to this proceeding, the Student was under the age of five. In addition to symptoms consistent with a diagnosis on the autism spectrum, the Student has medical issues, including tuberous sclerosis. Although the Board argued that the Student has cognitive deficits consistent with an intellectual disability, one of their own experts, Dr. Majure testified that [the Student] "got" the task very quickly, "almost instantaneously." This suggests that his intellect may be quite the opposite of disabled, one more unknown about this young child. CT scans performed on the Student after birth indicated multiple benign, non-progressive optical tubers (tumors) in the brain. The Student also has several of these tubers in the heart, although they do not affect his heart. One of the tubers is located in the Student's left eye, which has caused blindness in

that eye; his right eye has perfect vision, and he has compensated for the left eye with his right. (P.1, pg. 1-2, testimony of Mother B-23; 3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal)

2. While motoric developmental milestones were achieved within normal limits, the Student “exhibited delays in the development of spoken language.” In addition to concerns about the Student’s language delays, the Mother was becoming concerned about some odd behaviors which she was seeing in the Student, including repetitive sliding of the doors, fascination with wheels, fans and lights, as well as his failure to respond to his name. (Testimony of Mother, P.1, pp. 3-4)

3. Because of these concerns, the Mother made an appointment for the Student in November of 2002 with Dr. Solomon, a development and behavior pediatrician and professor at the University of Michigan, when the Student was approximately 22 months old. Noting several concerns in interaction (such as not responding to his name) and some relative strengths as well, Dr. Solomon concluded that because of the child’s young age it was not possible to make a definitive diagnosis between autism and pervasive developmental delay but recommended:

“In terms of the possibility of an autistic spectrum disorder, it is not clear to me that a diagnosis can be made at this time. Children with genetic disorders commonly present with autistic-like features. [The Student’s] profile of fairly good social skills given his developmental delays throws doubt on the diagnosis of autism proper. Nonetheless, it is my opinion that [the Student] should be treated as if he had autistic disorder in order to distinguish between these above 2 possibilities.

Therefore, I am recommending that [the Student’s] mother institute an intensive behavioral intervention program between 15 to 20 hours per week.” P-27 pg. 2.

4. The Student moved to Connecticut in December of 2002. The Student began to receive speech, occupational therapy, early intervention, special education, and physical therapy from Birth to Three based on Dr. Solomon’s report. The Mother supplemented these services. (Testimony of Mother)

5. Ms. Debbie Nolan, transition coordinator for the Board, visited the Student’s home on September 18, 2003 to discuss the transition process. During this visit, the Mother gave Ms. Nolan a copy of Dr. Solomon’s report. (Testimony of Mother, B.22)

6. On September 18, 2003, the Parent, staff of the Birth to Three program that the Student was attending, and Debbie Nolan, liaison of the Danbury Public Schools to the Birth to Three programs met to discuss the Student’s transition from the Birth to Three program to the programs available in the Danbury Public Schools upon the Student reaching the age of four (1/9/06 Tr. Mother; 3/24/06 Tr. Todd; B-22, p. 5). The Parent agreed with the district’s recommendation that she and Ms. Nolan visit the available programs within the Danbury Public Schools. (B-22, p.5). At that time, the Parent indicated that “she would like [the Student] to have experiences with other children.” Id.

7. At a PPT held on October 23, 2003, the PPT identified the Student as eligible for special education and related services with the Primary Disability "To Be Determined". (B-22, pp.1, 4)

8. Between the October 23, 2003 PPT, at which the Mother signed consent for the Board to conduct numerous evaluations of the Student in order to plan an appropriate program for him, and the next PPT which was convened on December 22, 2003, none of the evaluations proposed and agreed upon at the October PPT had been undertaken by the Board. (Testimony of Mother, B.24)

9. At the December 22, 2003 PPT, the Mother, who is a physician, brought an advocate with her, because she was concerned about the Student's education and didn't feel she knew enough about the process. She further brought with her information for the Team to review and consider, including literature on TSC and autism. The Mother explained to the PPT that there is a link between autism and TSC. (Testimony of Mother)

10. The only evaluative material which the Board had completed or reviewed at the December 22, 2003 PPT regarding the Student was a Health Report, which had been completed by Jean S. Kunkel, R.N, and Birth to Three reports. (B.24, pg 16)

11. During the December 22, 2003 PPT, the Mother made it clear to the Team that she saw the Student as having autism, and that he needed to be educated in such a way as to address his autism. She informed the PPT that she did not believe the Student made much progress in his Birth to Three program, and that she felt he needed an intensive and structured intervention program. (Testimony of Mother) The evaluations the Board received from Project Interact, the Birth-to-Three program that the Student had attended, included the following information: "[The Student] was eager to play and participated in the tasks presented which were guided informally. . . [The Student] is developing vocabulary and speaks frequently using single words in English and Mandarin to communicate his needs and wants." (Occupational Therapy assessment, B-23, p 1-2) The Speech-Language Assessment performed by Project Interact noted: "[The Student] is demonstrating increased imitation of sounds and words (at the single word level) when modeled during play. . . .Initially, [the Student] learned the sign for 'more' and was able to use it (with prompting) to request items. He now produces the word verbally and at times uses it spontaneously to make requests. Other spontaneous requests have also been noted in recent months including: down, open, bubbles, hug, come, play, etc. He responds to greetings verbally giving minimal prompting, at times. . . .Additionally, he demonstrates greater consistency for attending to his name and has started to use his name when pointing to himself." (B-23, p.5) The PPT believed that the evaluative information about the Student's levels of performance demonstrated that he could participate successfully with nondisabled peers in the reverse mainstream program. (3/24/06 Tr. Todd)

12. At the December 22, 2003 PPT, the Mother expressed interest in a program at Hayestown Elementary School solely for disabled children which featured a great deal of one-on-one instruction in isolation taught by Nonna Neal. (3/2/4/06 Tr. 3/24/06 Tr. Todd)

13. Despite the Mother's requests, the Board offered a half-day program, four days per week, at the Mill Ridge developmental pre-school program, for a total of ten hours per week of

services. It is unclear from the IEP whether this was 10 hours per week of 2:1 special education with speech consultation, or 7.75 hours per week of special education and a 1.25 of speech services. (Compare B.24, pg. 1 and B.24, pg. 12) The IEP indicates that the Student would be “fully integrated” with typical peers. (B.24, Testimony of Mother). At this PPT, the Board recommended placement in a fully integrated preschool program attended by both disabled and nondisabled students, in a reverse mainstream model, at Mill Ridge Primary. (B-24, p. 12; 3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal)

14. The Mother signed consent at the December 22, 2003 PPT for the district to place him into special education and into the proposed program. (Testimony of Mother, B.23, pg. 14). The Student was to begin in program immediately following the holiday break, approximately two weeks prior to his third birthday. (3/24/06 Tr. Todd)

15. Following the December 22, 2003 PPT, the Mother changed her mind in that she was concerned that the IEP and program were not appropriate for the Student. She believed that the school district would offer a different program to the Student if he had an official diagnosis of autism. On December 23, 2003, just one day after the PPT decided to place the Student in the reverse mainstream program, the Parent faxed a letter to Ms. Todd withdrawing consent for the placement. (3/24/06 Tr. Todd) Accordingly, the Student was never enrolled in that program. (Testimony of Mother, P.22)

16. The Parent’s withdrawal of consent necessitated another PPT to address her concerns and plan a program for the Student. (3/24/06 Tr. Todd) The Board attempted to schedule the PPT as soon as possible in January, so that the Student could begin receiving services. (3/24/06 Tr. Todd). The Parent’s schedule could not accommodate any of the dates in early January proposed by the Board. Accordingly, the PPT did not convene until January 26, 2004.

17. Prior to the next PPT (January 26, 2004), the Mother sent to the district an additional letter from Dr. Solomon, dated December 20, 2003, in which he indicates that based on his evaluation of the Student thirteen months earlier (December 2002) and the results of more current evaluations (by other than Dr. Solomon), “given (the Student’s) TS with its very high association with autism, it is my opinion that (the Student) has an autistic disorder. He should receive intervention consistent with the National Academy of Sciences guidelines for children with autism that includes 25 hours per week of individualized therapy (1:1 teacher to student ratio) that is engaging and focuses on language and social skills.” (Testimony of Mother, B.21, pg. 30). Based on her consult with Dr. Solomon the Mother, who is also a physician, had the expectation was that if the appropriate services were provided with sufficient intensity and the correct diagnosis was autism then the Student’s progress would shoot up whereas if the correct diagnosis was pervasive developmental delay the progress would not be as great. For reasons that were never sufficiently explained the Mother did not make the Board aware of this evaluation until after the December PPT. Testimony of Mother.

18. In addition to the updated information from Dr. Solomon, the Mother provided the district with a copy of an evaluation by Dr. Prather, Staff Neuropsychologist at Massachusetts General Hospital/Harvard Medical School. This evaluation entitled Report of Neuropsychological Consult was conducted on July 25, 2003. The report was seven and a half

single spaced pages long and reflected a particularly thorough and comprehensive evaluation. In her report, Dr. Prather notes: “While it would be premature (given [the Student’s] developmental age) to make a formal diagnosis of PDD at present, nonetheless current findings certainly warrant specialized and intensive therapeutic and educational interventions appropriate for a child who shows atypical social communication skills as well as general delays in development in the context of a neurogenetic disorder.” (B.21, pg. 35)

19. Although the Parent requested that the Student’s label be changed to “autism” at most PPT meetings, the Board believed that, given his young age and the complex nature of his many disabilities, the label of developmental delay was appropriate. (3/24/06 Tr. Todd; 9/25/06 Tr. Emmett) According to the Director and the Special Education Supervisor, a change in the label would have had no impact on the services provided to the Student, as the Board informed the Parent. (3/24/06 Tr. Todd; 9/25/06 Tr. Emmett).

20. The following individuals attended the 1/26/04 PPT: Audrey Todd (now Todd); the Parent; the Parent’s advocate from We Care; two special education teachers, Nonna Neal from Hayestown School and Dorri Barlow from Mill Ridge Primary School; Joyce Emmett, the Director of Special Education; Donna Kalb, a speech and language pathologist; Nancy Gerring, a school nurse; Sue Levasseur, the Director of Nursing; and Deb Nolan, the Board’s liaison to out of district Birth-to-Three programs. (B-21, p.1) The Board members of the PPT continued to believe that the placement recommended at the December 22, 2003 PPT, in the reverse mainstream preschool, while the Parent wanted placement in the more restrictive Hayestown program. (3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett)

21. The Board members of the team continued to inform the Parent that the Hayestown program was too restrictive for the Student, and that he was too high functioning for that program. (3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett) Because the Parent had not provided the Board with copies of the evaluations by Dr. Solomon and Dr. Prather until after the October 2003 and December 2003 PPTs, and because the Board members of the team viewed both evaluations, one done thirteen months earlier and updated in December 2003 and the other done six months earlier, in August 2003, as stale, given the young age of the child, the Board members of the PPT continued to maintain that the reverse mainstream program at Mill Ridge was appropriate and the least restrictive environment for the Student. (B-21, p2; 3/24/06 Tr. Todd; 9/25/06 Tr. Emmett). However, between the December 22, 2003 PPT and the January 26, 2004 PPT, the district did not complete any of the evaluations of their own which had been proposed and consented to on October 23, 2003. Even though the district had a signed consent to conduct a multi-disciplinary evaluation since October 23, 2003, the district asked the Mother to sign a new Consent to Evaluate form on January 26, 2004 at the PPT. The October 23, 2003 consent form was entitled “Notice and Consent to Conduct an Initial Evaluation,” whereas the January 26, 2004 form is “Notice and Consent to Conduct a Re-evaluation.” (Testimony of Mother, B.22, pg. 4, B.21, pg. 40).

22. At the January 26, 2004 PPT Ms. Neal, who had observed the Student, told the Parent that the Student was higher functioning than any of the students in her class, and that the program would not be sufficiently challenging for him. (8/24/06, 8/29/06, 11/21/06 Tr. Neal) She also explained, as did Ms. Emmet and Ms. Todd, that the Hayestown program was the most

restrictive program in the district. (3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett). The minutes reflect that “The pre-school teacher delivering the ABA program stated that her program is too restrictive for initial placement”. B-21, pg. 2.

23. Although the Board members of the team continued to advocate for the Student’s placement in the reverse mainstream program at Mill Ridge, the Parent continued to insist on placement in Ms. Neal’s classroom. (3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett) Because the team believed it was important for the Student to attend school, and because the Parent had made it clear that she would not send the Student to Mill Ridge, the Board members of the team finally acquiesced to the Parent’s request and placed the child in Ms. Neal’s classroom at Hayestown, although Ms. Neal indicated that she did not support the Student’s placement in her classroom. (Testimony of Mother, B.21, pg. 2) Although Ms. Todd, on the other hand, testified that she did not have enough information to form an opinion on whether the Student had autism. The Board agreed to the Parent’s request to get the Student into school, and in hope that the Board could begin working with the Student and ultimately get the Parent to see that a less restrictive program was a better placement for her son. (3/24/06 Tr. Todd; 9/25/06 Tr. Emmett)

24. The goals and objectives, and the services to be provided to the Student, did not change as a result of the Board’s acquiescence to the placement of the Student at Hayestown. All members of the team, including the Parent, agreed that the goals and objectives developed at the 12/23/03 PPT were appropriate, and these goals and objectives were incorporated in the IEP developed at the 1/26/04 PPT. The goals were designed for a year; the last reporting period on each goal and objective page indicated “11/15/04”. (B-21, pp 5-12) The IEP included a social behavioral goal regarding social interaction skills, and objectives regarding responding and initiating greetings, giving objects to peers and adults when asked, and engaging in parallel play. (B-24, p.4) This goal and the related objectives responded to the observations included in the Birth-to-Three documentation. (Cf. B-23 p.5 and B-24 p.4) The communication goal, to increase expressive communication and oral motor skills, and the accompanying objectives regarding expressing wants and needs in a number of ways, imitating words and sounds, and oral motor activities addressed his emerging skills as identified by the speech and language assessment performed by Project Interact. (Cf. B-23, p4 and B-24 p. 5). The academic goal, to increase general learning and cognitive skills, with objectives regarding imitation of simple actions with objects, imitation of gross motor actions, and matching shapes and objects in response to verbal cues, were also well-aligned with the profile of the Student presented by Project Interact: “[The Student] is more consistently following directions to ‘put in’ and ‘give’ objects. . . He is beginning to spontaneously clap and point.” (B-23, p.1; B-24 p. 6) The IEP also included speech and language services. Id.

25. The Student began at the Hayestown program on January 29, 2004. In addition to the services the Student was provided in school, the Mother supplemented his program with related services of occupational therapy, physical therapy, and speech. When the Student began the district program on January 29, 2004, he did not receive any occupational or physical therapy services, and received only an hour of group instruction per week in speech within the classroom. (Testimony of Mother, B.21, pg. 13)

26. The Mother observed the Student for the first time in his program at Hayestown on February 19, 2004. She observed him on that day from the beginning to the end of *his* services but not the entire day. Even though the Student's program was a half-day, the rest of the students in the Hayestown program remained in the classroom after the Student would leave in the middle of the day, as they had full-day programs. (Testimony of Mother)

27. During her observation on February 19, 2004, the Mother was able to see the Student participate in discrete trial instruction, music therapy, and circle time. While she felt he seemed to be making progress and benefiting in the discrete trial instruction, she did not believe he was benefiting from the group instruction. She noticed that the Student was "stimming" and distracted by the light fixtures in the room. (Testimony of Mother)

28. While at the school observing the Student on February 19, 2004, the Mother saw that there was a consultant in the classroom, Mr. Greg Smith, a Board Certified Behavior Analyst and ABA consultant to another child in the Hayestown classroom. The Mother had never met or heard of this consultant, nor had he ever attended any PPTs for the Student. She saw that he was instructing the tutors on how to teach ABA, and she was "impressed." She was introduced to him, and she asked him if he could also consult to the Student's case. His response was that it was not his decision, and that she should ask Ms. Audrey Todd, the administrator of the program. (Testimony of Mother)

29. The next day, February 20, 2004, the Mother wrote a letter to Ms. Todd and requested that Mr. Smith be assigned as an independent consultant to the Student's program, as he "seems to be an excellent ABA expert." (Testimony of Mother, P.21)

30. Having received no response to her February 20, 2004 letter, the Mother again contacted Ms. Todd on March 2, 2004 about having Mr. Smith consult to the Student's program. (Testimony of Mother, P.20)

31. Having still received no response, the Mother wrote a third time on March 17, 2004 again asking for Mr. Smith to be the ABA consultant to the Student's program. (P-19). Ms. Todd called the Mother on March 17, 2004 in response to her letters, and agreed to have Mr. Smith observe the Student in the classroom later in March. Prior to that observation, on March 18, 2004, the Mother sent a letter to Ms. Todd in which she outlined several questions which she believed the district's ABA consultant could answer about the Student to help in developing an appropriate program. (Testimony of Mother, B.20)

32. In addition to being a Board Certified Behavioral Analyst, Mr. Smith is the adoptive parent of an autistic child. (4/20/06 Tr. Smith) He has been employed by CREC River Street for sixteen years, and consulted with Danbury for seven or eight of the past ten years. (4/20/06 Tr. Smith) Mr. Smith has a bachelor's degree in psychology and human relations, a master's degree in counseling psychology, and is a Board Certified Behavior Analyst. (4/20/06 Tr. Smith) Mr. Smith has twenty-five years of experience working with children on the autism spectrum. (4/20/06 Tr. Smith). Mr. Smith is a proponent of discrete trial instruction and applied behavioral analysis. It is his professional opinion that some autistic students cannot be educated with nondisabled peers and should be educated solely with similarly disabled children. (4/20/06 Tr.

Smith) Mr. Smith believes that CCCD is an appropriate placement for some children with autism. (4/20/06 Tr. Smith).

33. Mr. Smith observed the Student in the Board's program in March, 2004, after the Student had been enrolled in the district for approximately two months. Mr. Smith did not believe, based upon his observation, that a segregated placement was appropriate for the Student. Specifically, Mr. Smith noted that: "[The Student's] interest in social interaction, his high level of cooperation, and his ability to verbally imitate a model, all serve to foster new learning. He was responsive and *interactive* within the structure that was provided. . . [The Student] demonstrated a variety of adaptive skills. . . He willingly entered an unfamiliar class and sat with the children for snack. (B-19, p. 28) While Mr. Smith noted that the Student was progressing in the highly structured setting provided by Ms. Neal's class, he also noted: "[B]ehavioral approaches are limiting and his current class does not offer the continuous and rich exposure to appropriate language and social models found in typical preschools. (B-19, p29)(emphasis added) Mr. Smith recommended two to four week trial period in a mainstream setting for the Student, to ascertain how well he responded to that setting and to assess what supports he might need in it. (B-19, p.29) Mr. Smith also noted that: "During the observation, [the Student] thoroughly enjoyed his speech class. Not only did he respond during his turn, but he also followed the action around the circle as other students responded. The activities and pace of the group seemed to be very appropriate to his needs." (B-19, p. 30) Based upon his observations of the Student, Mr. Smith recommended that the Student be placed in a more inclusive setting, as the Board had proposed from the beginning. It had been agreed that when Mr. Smith was finished with his observation he would come to the Mother's office to review his observation with her. In his discussions with her, Mr. Smith told the Student's mother that he had seen limited communications between the Student and his peers in his classroom, and that he wanted to see if he could take the Student out of the ABA classroom and observe him with typical children, but he was unable to do that. Instead he brought the Student into a classroom that was approximately 50% typically developing children and 50% children with disabilities. Mr. Smith told the Mother that he felt that trying the Student in the preschool classroom for a month to see if he could model the language of the other kids made sense. When the Mother asked what would happen if the Student couldn't do that, he said that the Student could always then move back to the ABA classroom at Hayestown. (Testimony of Mother)

34. At around the same time Ms. Todd agreed to the Parent's request to have Mr. Smith observe the student, Ms. Todd also asked the district's other outside autism consultant, Dr. Ann Majure, to observe the Student in Ms. Neal's classroom and make program recommendations. (3/26/06 Tr. 3/24/06 Tr. Todd; 5/4/06 Tr. Majure) Dr. Ann Majure is an independent consultant who was under contract to the Danbury Public Schools from 2001 until the end of the 2004-05 school year. (5/4/06 Tr. Majure) Dr. Majure worked with the district on students on the autism spectrum. (5/4/06 Tr. Majure) Dr. Majure has a bachelor's degree in science and mathematics, a master's degree in clinical social work and a doctorate from the University of Wisconsin in special education. (5/4/06 Tr. Majure) Her doctorate focused on the education of individuals with severe communication and behavioral disorders. (5/4/06 Tr. Majure) Dr. Majure worked for the Institute for Applied Behavioral Analysis in Phoenix and California for three and one half years. (5/4/06 Tr. Majure) She was employed by Giant Steps, a private, segregated school for students with disabilities, as the inclusion facilitator. (5/4/06 Tr. Majure) She has worked as a

consultant to school districts regarding students with autism, as well as other disabilities, since the early 1990s. (5/4/06 Tr. Majure) While Dr. Majure believes that discrete trial instruction is appropriate for some autistic students, she believes that many such students should be educated with their nondisabled peers. (5/4/06 Tr. Majure).

35. Dr. Majure observed the Student for the first time on March 11, 2004. (B-19, p.33) Dr. Majure noted that the Student had the skills of using verbal speech and manual signs to initiate communication and respond to staff; maintaining appropriate affect and eye contact during communication; walking and using stairs with minimal assistance; imitating a range of verbal and physical tasks; and using objects appropriately. (B-19, pp. 33-34). Dr. Majure believed that Ms. Neal's classroom was too restrictive a setting for the Student. (B-19, p. 34) She also believed that the discrete trial format should not be the primary teaching mode for the Student. Dr. Majure's report indicated: "I also have some concerns about his spending large portions of this day working in a discrete trial format. He learns quickly when presented with new tasks. He is also intrinsically motivated by learning. It does him a disservice and could actually dampen his natural curiosity to continually pair his performance with a tangible reinforcer. I recommend that he spend a portion of his day learning in center-based activities with typical preschoolers. A modified trial format may be beneficial to teach certain new, specific skills. However, once he understands the task, [the student] should then practice the skill in more natural contexts." (B-19, p34)

36. A PPT was convened on April 1, 2004. Neither Mr. Smith nor Dr. Majure, the district's consultants, was invited to attend the PPT and they should have been. Instead their consultation reports were reviewed. (B.19) In a progress report presented at this PPT, the first PPT after the student began attending the program at Hayestown, Ms. Neal reported great progress but her testimony is given little weight for several reasons. First, she appeared to be at least indifferent and perhaps hostile to the Mother. For instance, she testified that she knew the Student was getting outside services and this was important information but she didn't know what the extent was and she didn't ask the Mother because the Mother didn't offer it. She admitted that the Mother always answered questions, so politeness (or lack thereof) on the part of the Mother was never raised as an issue. Ms. Neal's contribution to the team and ultimately to this Student is undermined by the observations made by Dr. Breslin, the evaluator who observed Ms. Neal's teaching techniques during the summer program.

37. All of the professionals providing services to the Student noted that he had made significant progress on his agreed upon goals and objectives established at the December 22, 2004 PPT and incorporated into the January 26, 2004 IEP in the brief time he had attended the Board's program. The Mother disagreed with this, and did not believe that the Student was making the kind of progress the team was reporting, especially in the area of speech and language. She told the PPT that she wanted to know how they could measure the Student's progress "objectively." The PPT suggested that a speech evaluation be undertaken and a discussion was also had regarding whether an Assessment of Basic Language and Learning Skills (ABLIS) testing should be performed. No consent form is attached to the minutes of this PPT regarding either a speech and language evaluation or ABLIS testing. (B.19, Testimony of Mother)

38. The April 1, 2004 PPT at first recommended a 15 hour per week program, inclusive of related services. The Mother was requesting additional discrete trial and ABA but then agreed that the Student could receive a full-day program at Hayestown, for a total of 18.25 hours a week of special education and 4.25 hours a week of related services, to be provided in a less restrictive setting with typical peers. (Testimony of Mother, B.19, pp. 2 and 19)

39. The Mother requested at the April 1, 2004 PPT that Mr. Smith be the ABA consultant to the Student's program. This request was denied by the team, and instead Dr. Majure was to be the "autism consultant." (Testimony of Mother, B.19, pg. 1)

40. Although the April 1, 2004 PPT lasted over two hours, the Mother was upset that several of the items she wished to discuss, including her own observations of the Student in his program, Dr. Prather's report, and reimbursement of the related services she had been providing, had not been, and that time was spent inappropriately reading Dr. Mather's report. All of the members of the PPT agreed that the Student qualified for extended school year ("ESY") services, and the Board agreed to the request of the Parent and her advocate that summer program be discussed at another PPT, to be convened in early June, 2004. (B-19, p.2)

41. There is no Prior Written Notice page attached to the April 1, 2004 IEP which would indicate which actions were considered or refused by the PPT. (B.19)

42. On April 3, 2004, the Mother wrote to Ms. Todd, indicating that she did not feel that she had sufficient time to discuss her concerns at the April 1, 2004 PPT, and requesting that a PPT be reconvened to continue discussions on the items she wished addressed. She granted permission for the IEP proposed at the April 1, 2004 PPT to be implemented "as a temporary or diagnostic program." The Student began his full-day program on April 9, 2004. (Testimony of Mother, P.17)

43. On April 15, 2004, the Mother observed the Student in his new program at Hayestown. She observed the full day, which included circle time, APE, discrete trial, music, and choice time. She did not agree that there was the progress that the PPT members had reported at the April 1, 2004 PPT. Instead, the Mother noted that the Student did not initiate greetings, continued to be distracted by the ceiling fixtures, did not engage in imaginative play, and did not interact with his peers. Of greater concern, the Mother observed four instances of the Student screaming and crying. The behavior occurred at various points in the day, within different settings and services. In general, the Mother's impressions of the Student's program based on her April 15, 2004 five-hour observation was that he was not benefiting from his program, other than discrete trial instruction time. She felt he was distracted, overwhelmed, and disengaged the remainder of the day. (Testimony of Mother)

44. Between the April 1, 2004 and April 27, 2004 PPTs, no ABLLS or speech and language testing was undertaken, as recommended at the April 1, 2004 PPT. In addition, the raw data requested by the Mother, which she had been requesting for over two months, had not been provided. (Testimony of Mother, P.16)

45. The PPT was reconvened on April 27, 2004. At that meeting, the Mother requested an independent educational evaluation. The Team agreed, and it was further agreed that it would be performed by Dr. Michael Powers. Consent for this testing was signed by the Mother at the PPT. (B.18, pg. 27)

46. The April 27, 2004 PPT denied some of the Mother's requests and agreed to some of them. The PPT denied a change of classification from "developmentally delayed," to "autism." The PPT denied payment for the private therapies the Mother had been providing to the Student outside of school. The PPT denied a home program. The PPT denied an increase in discrete trial instruction. The PPT denied assigning Mr. Smith to the Student's program. The PPT disagreed that the Student needed more speech therapy and an extended school day that would include a home-based ABA component (Testimony of Mother)

The Board agreed to several of the Parent's requests, including: lengthening the Student's hours of service per week from 24.5 hours to 27.5 hours; an evaluation by the Center of Children with Special Needs, led by Dr. Michael Powers; and an increase in the consultation services from Dr. Majure from 4-6 times per school year to monthly. (B-18, p. 3) The Board agreed to these requests solely because the Parent asked for these increased services; the Board saw no need for increased services or for the information that the outside evaluation might provide. (3/24/06 Tr. Todd)

47. The Parent continued to request that more of the Student's program be delivered in the discrete trial format, despite the fact that all of the Student's service providers, and the Board's two outside consultants, Dr. Majure, whose services the Board has requested, and Mr. Smith, who became involved with the Student at the Parent's request, did not support this service model, and advocated a less restrictive setting for the Student. (3/24/06 Tr. Todd; 4/20/06 Tr. Smith 5/4/06 Tr. Majure)

48. The very first 'team meeting' of the school year between the Mother and the staff of the Student's program occurred on May 12, 2004. A second team meeting was held on May 25, at which time the Mother asked about the status of the ABLLS testing recommended on April 1, and was told for the first time that the district was waiting for her input to complete the assessment. She was given the booklet to fill out for the first time at the May 25, 2004 team meeting. (Testimony of Mother)

49. The Mother observed the Student on two occasions in May, 2004 in the mainstream program at Hayestown when he was placed with typical peers. Each of the observations lasted a half an hour and the Mother did not agree that there was the interaction with peers and felt, on the second visit that the Student was "moving his leg, shaking his head, looking at the light, he was not attending" for the thirty minutes he was in the classroom. He was then brought back to the ABA classroom. (Testimony of Mother).

50. The Board convened another PPT for the Student on May 27, 2004, just one month after the most recent PPT, and just seven weeks after the PPT held prior to that one. (B-15) In attendance at this meeting were: the Parent; Richard Freeman, the Parent's advocate; Sherri Lauro, an outside speech consultant retained by the Parent; Nadine Chikieni, a friend of the

Parent; Ms. Emmet; Ms. Todd (now 3/24/06 Tr. Todd); Dr. Majure; Ms. Neal; Ms. Maneri; Ms. Leung; Ms. Levasseur; and Ms. Mullins. (B-15, p. 1) The purpose of the PPT was to review the Student's goals and benchmarks and to review speech testing. (B-15, p. 2) The Mother had sent to the district a speech and language evaluation completed by Dr. Nancy Schwartz, in advance of the PPT, and wanted it to be reviewed at the PPT. The Mother was particularly concerned about the Student's speech and language needs, especially since, at the time, the Student was receiving only fifteen minutes per week of individual instruction from the speech therapist. Dr. Majure noted at the PPT that Dr. Schwartz's evaluation "had some really wonderful, very detailed recommendations about how that language is reinforced in a very functional way throughout his day." The district's speech pathologist recommended an increase of the Student's individual (versus group of five-six students) speech therapy to a total of a half an hour per week total. Dr. Schwartz recommended four weekly sessions for 30 minutes of therapy with the Student and one other child. The PPT increased the Student's time in speech therapy to two hours a week, one hour of which would be one to one and one hour of which would be in group. (Testimony of Mother, Testimony of Dr. Majure, P.30, pg. 3, P.36, pg. 64; B.15, pg. 2) The Board also agreed to perform a home environmental assessment, with Dr. Majure providing ongoing consultant support, after a home visit by Board staff. (B-15, p.2) The Board agreed to these Parent requests solely as a part of its ongoing effort to appease the Parent; the Board did not believe that either change was necessary for the Student to receive educational benefit. (3/24/06 Tr. Todd) The Board declined to increase the hours of the Student's ESY program and refused to pay for a home program with the Parent's chosen private therapist. 3/24/06 Tr. Todd; 9/25/06 Tr. Emmett; B-15, p2). A review of a transcript of the proceedings illustrates the dealings between the Board staff and the Mother. After much discussion and denial of the ongoing requests that the Mother had made for additional services for the Student, her advocate indicated to the team that part of the reason she was asking for these things is that she didn't feel that the Student has made much progress. He suggests that she share with the team graphing she had done of the district's own testing. As she began to explain that she was anxious that the PPT was running out of time, Ms. Todd responded with the following:

"In terms of PPT meetings, we have, by federal law, to do them at least once a year. That's federal law. The parent, anyone, has a right to call one at any time they want. Typically, they're an hour. Typically, [the Student], let's say an hour and a half. He's got more going on. We have met five times on the Student. And that's unusual. I'm not saying you don't have the right. It's just unusual. We've had things to iron out and we've done that. Every time we have two/three-hour meetings, kids aren't getting served. Your child's not getting served. And we – I want these people out working with kids." (P.36, pg. 111, emphasis supplied)

Clearly the Board was at least frustrated with the Mother by this point, and clearly the Board felt they had spent enough time in PPTs for this Student.

51. A third team meeting was held on June 10, 2004. The meeting was used to discuss the goals and objectives for the Student. While agreement was reached as to some of the goals, the Mother indicated she still needed to review them with her consultants and that they were still considered draft goals and objectives in her mind. (Testimony of Mother)

52. The Board convened another PPT on June 15, 2004, less than three weeks after the most recent PPT. (B-26, p. 1) The purpose of the PPT was to review the goals and objectives for the

2004-05 school year and to address Parent concerns. (B-26 p. 2) This was the fourth PPT to be convened about the three-year-old student in the ten-week period between April 1, 2004 and June 15, 2004. (B-15; B-18; B-19, B-26). Agreement was finally reached on most goals and objectives for the Student. The PPT granted some of the Mother's requests and denied others. In particular the Mother, who had been expressing concerns about the Student's behavior at home, reiterated her request for home ABA services and the Board instead offered a home evaluation which the Mother refused. (Testimony of Mother, B.26, P.36, pg. 109) The PPT agreed that the Student's program for the 2004-05 school year would be ten hours per week in a preschool setting with typical peers, and the remaining sixteen hours in Ms. Neal's classroom, with the occupational and physical therapies as well as adaptive physical education as part of the sixteen hours in Ms. Neal's room. (B-26, p. 3, 28). The Board members of the PPT continued to believe that a less restrictive program could meet the Student's needs, but agreed to allow the Student to continue to receive programming in Ms. Neal's room at the request of the Parent. (3/24/06 Tr. Todd). The PPT had previously agreed upon the Student's program for the summer of 2004, and the Board declined to alter the ESY program at the June 15, 2004 PPT. (3/24/06 Tr. Todd) The Parent requested additional services, in a number of areas, including increases in physical therapy and occupational therapy, which the Board agreed to. (B-26, p.3). The Board agreed to these increases in services solely to reach agreement with the Parent; the Board did not believe the additional services were necessary for the Student to receive educational benefit. (B-26, p. 3)

53. The Student's summer program began in late June, soon after the regular school year had ended. (3/24/06 Tr. Todd; 8/24/06, 8/29/06, 11/21/06 Tr. Neal) Although the Parent had requested that the Board increase the amount of services and the number of hours and days of services to be provided to the Student in his summer program, the Student often arrived late for his summer program. (8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett). The Student missed one to two hours of his summer program days due to his late arrivals so frequently that Ms. Neal became concerned about it, and informed Ms. Emmet about her concerns. (8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett) Ms. Emmet wrote to the Parent about the District's concerns regarding the amount of time the Student was missing from his summer program, noting: "As a result, [the Student] has missed many instructional opportunities. [The Student's] program is structured to provide him not only with 1:1 ABA instruction, but also opportunities to generalize skills learned in a variety of settings. Other activities allow for the development of language skills with both children and adults. In examining the data since [the Student] has begun arriving late to school, his teacher has noted a decline in [the Student's] rate of growth. We are recommending that you arrange for [the Student] to arrive at school at 8:30 so that he can benefit from all of the instructional activities that the team has planned for him." (B-6, p.1)

54. Although the Parent had requested that the Board employ the Center for Children with Special Needs, led by Dr. Michael Powers, to perform an evaluation of the Student, and the Board had agreed to retain Dr. Powers to do so, the Parent did not find out until the May 27, 2004 PPT that Dr. Powers' office would not schedule the evaluation until Danbury confirmed payment. (P.36, pp. 43-47) The Mother sent a letter to Ms. Todd immediately following the May 27 PPT indicating her concerns about another four month delay, and requesting that the Institute for Educational Planning, LLC in Milford conduct the IEE. (B.14) On June 7, 2004,

Ms. Todd wrote to the Mother, stating “we are denying your request and will proceed with Dr. Powers’ evaluation.” (B.13) However, on July 30, 2004 the Mother received a letter from Dr. Powers’ Center informing her that she would be responsible for full payment. B-3.

55. The Parent retained Anita Breslin, and because of the timing (in the summer during the Board’s summer ESY program) Dr. Breslin observed the Student in his then current placement which was the Board’s summer program. The observation occurred on July 22, 2004 for approximately two and three-quarters hours. (9/25/06 Tr. Emmett, 8/24/06, 8/29/06, 11/21/06 Tr. Neal) . Dr. Breslin holds her doctorate in psychology, and she is also a Board Certified Behavior Analyst. She is both a licensed psychologist and certified school psychologist. Her entire private practice is focused on the evaluation of children and adolescents with autism spectrum disorders, of which she has performed over 150. Combining her experiences before and outside of her private practice with those in her private practice, she has evaluated literally hundreds of students with autism spectrum disorders. Most of her evaluations include a school observation. She was the most experienced witness to testify regarding children with autism and was a highly credible witness. Dr. Breslin’s observation led her to conclude that the Student was not engaged in his program, was not interacting with the other students and in fact appeared “unaware of them,” and was “isolated.” In addition, the program was not an ABA program, and much of the Student’s day was not beneficial to him, including his group speech session. Numerous inappropriate behaviors on the part of the Student or other children in the classroom were not addressed properly, including the screaming and crying of one of the other students. There were not clear contingencies for behavior. These, among other factors, led her to conclude that the program in which the Student was placed for the ESY 2004 was inappropriate for him and that he was not being taught properly. An example she gave was of snack time; the Student was not even able to hold his utensils, and was literally being fed by staff members. She believed that an appropriate, systematic approach to teaching him this skill would work. (Testimony of Dr. Breslin, P.15) In her psychoeducational assessment Dr. Breslin states: “It should be noted that [the Student] was already provided with a variety of enjoyable activities and there were no specific performance expectations prior to receipt of these preferred activities. Such free access is contrary to ABA-based instructional programming, which emphasizes contingency-based performance opportunities. That is, a student is reinforced with preferred activities and other tangible items when the have responded as intended or desired.” P-1 at 7.

56. The Student did not attend the additional two weeks of extended school year services with Ms. Neal recommended at the April 24, 2004 PPT. (8/24/06, 8/29/06, 11/21/06 Tr. Neal; 9/25/06 Tr. Emmett).

57. The Mother withdrew the Student from the Danbury Public Schools and placed him unilaterally at the Connecticut Center for Child Development (hereinafter CCCD) where he began on September 7, 2004.

58. CCCD is an ABA based program that provides services to children with autism spectrum disorders and is approved by the State Department of Education as a special education facility for children with autism.

59. Because CCCD could not accept the Student until September, the Mother did not feel the Board's ESY services were appropriate. She arranged for the Student to receive private ABA services in the home beginning in late June through August. The Student received 10 hours per week of ABA services through the Student's private ABA consultant, Ms. Lauro. While the Mother wanted to provide the Student with much-needed OT and speech services, she was unable to do so, due to financial limitations. (Testimony of Mother)

60. The Mother requested that the Board fund the placement at CCCD at a PPT held on September 7, 2004. A transcript of the proceeding was certified by Post Reporting Service as "a correct and verbatim transcription" of supplied tapes. The district attended with counsel; the Mother attended unrepresented.

"Ms. Todd: --his IEP. We have received a letter from you recently. You requested a PPT. So we're here to discuss what you'd like to address today.
 Mother: Yeah. As I said in my letter—let me find it.
 Ms. Todd: We've read it. So we –
 Mother: You read it.
 Ms. Todd: We know—
 Mother: Okay.
 Ms. Todd: We don't need to look at it.
 Mother: Okay. So what I would like to do at this PPT meeting request that [the Student] is going to CCCD and he is accepted. He actually started school, too. Yeah. I asked the school to support this issue.
 Brd Lawyer: The school will not support a placement at CCCD at this time.
 Mother: Well, that's—that's going to be my request.
 Ms. Todd: We had also indicated to you in writing that at the PPT we were going to ask you to consent to the Board of Education's evaluation of your son on September 17 by Dr. Gregory Javornisky. We have a consent that we wish you to sign. If you do not sign it, we will be asking for the hearing officer to order you to sign it.
 Mother: Well, this is the issue just sent to me. I want to know about this doctor a little bit more and I would like to have his credentials.
 Brd. Lawyer: You're not entitled to that. It's our evaluation and we select the clinician for it. And we have selected Dr. Javornisky. He is associated with the Connecticut Children's Medical Center. He is one of the two or three premier pediatric neurologists, neuropsychologists in the state of Connecticut. And we ask that you sign a consent. And if you don't give it to us, we'll ask the hearing officer to direct you to do so."

The Mother asked whether Dr. Powers was still acceptable, and was told that Dr. Javornisky was the district's preference. The Mother indicated that, before she would agree to Dr. Javornisky, she wanted to consult with an attorney, and that she was in the process of finding one. The Board's counsel responded: "We aren't going to wait to get consent for an evaluation while you look for an attorney. So if you – if you'll please sign the consent form – and if you don't, I'll be contacting the hearing officer this afternoon and have her direct you to sign it." When the Mother indicated that she would let the district know "in the next few days" who her attorney would be, the Board's attorney

stated: “I’m going to have to file with the hearing officer today, Ma’am. I can’t afford to wait that long.” The district was aware that the Student was already placed at CCCD at this time, and they acknowledged that they had notice of the placement. (Parent, 9/25/06 Tr. Emmett).

The entire transcript is seven pages long and the contribution of the special education teacher (Ms. Neal) consisted of the one word, “no”:

Mother: I’ll have my lawyer talk with you.

Brd. Lawyer: You don’t have a lawyer, Ma’am.

Mother: I will have a lawyer.

Brd. Lawyer: We’re not going to wait for you to get one.

The IEP, I assume, that we’re offering is the one?

Ms. Todd: Right

Ms. Todd: -- (indiscernible)

A Voice: (indiscernible) 6/17

Ms Todd: 6/17

Brd. Lawyer: And there’s no member of the team sees any need to change that?

Ms. Neal: No.

Brd. Lawyer: That’s what the student receives here in Danbury...” (P.38, pp. 1-7)

The hostility that the Board had for this Mother, which had been thinly veiled since the spring, was clearly apparent at this point and this PPT did not comply with the spirit or letter of IDEA.

61. By the time the Dr. Javornisky’s evaluation was completed, the Student had been enrolled at CCCD for several months. (9/25/06 Tr. Emmett) For this reason, the Board did not reconvene the PPT. (9/25/06 Tr. Emmett).

62 A review of the evaluation reveals that Dr. Javornisky, the Board’s own expert, concluded in part:

“Utilization of strategies for cognitive development that are often provided for the child within the autistic spectrum disorder could be useful in terms of ABA designs and discrete trials.

Given his performance in the evaluation today, it is not clear how much benefit [he] will have with reference to modeling behaviors of other children” P-28 at 3.

63. Dr. Breslin indicated in her report: “It should be noted that the current examiner has observed the preschool classrooms at CCCD on several recent occasions...It is the current examiner’s firm belief that CCCD can appropriately meet [the Student’s] multifaceted learning profile. [The Student’s] current enrollment at CCCD is appropriate given (his) current educational status, diagnostic profile and significant, challenging learning needs.” (Testimony of Dr. Breslin, P.1, pg. 19).

64. The Mother and the Board observed the Student at CCCD on November 18, 2004. There was a dramatic improvement in the Student from when he was being educated in the district,

both in his interaction with the instructors and in their responses to him. His language and attention were dramatically improved. Moreover, despite the fact that another student was crying in the classroom, an occurrence which was distracting to the Student as other children crying always has been, the staff were able to quickly and easily move his seat in such a way as to make the crying less obvious to him, and to redirect him with activities that engaged him. These strategies worked, and quickly. (Testimony of Mother)

65. In addition to improvements observed at school, there was progress in the Student at home once he began his CCCD placement as well. These improvements included being able to sit and eat in his high chair for longer periods of time and, as Dr. Breslin had predicted earlier, with appropriate instruction he was taught to use utensils to eat. He was having fewer tantrums and was more “purposeful” in his play with his toys. He was talking more at home, and his eye contact had improved. (Testimony of Mother)

66. While the Student was making great strides at CCCD, a job opportunity arose for his Mother which would require the family moving to New Jersey. The Student attended CCCD until mid-January, 2005, at which point the Mother could no longer transport him to and from the program. She provided approximately 14-20 hours per week of direct 1:1 ABA with Ms. Lauro from the time the Student left CCCD until they moved to New Jersey on February 9, 2005. The Student continued to make progress during the last month of services with Ms. Lauro’s group. (Testimony of Mother)

67. Ms. Castellani is the Clinical Director of Outreach Services for CCCD. Ms. Castellani did the intake assessment of the Student in July 2004. She concluded that he had an attending issue. He only had basic spontaneous requests such as “want chip, want toy.” Ms. Castellani concluded that the Student was a very good candidate for CCCD, and he responded very well to techniques used in ABA. Ms. Castellani and staff at CCCD also observed during their intake assessment that the Student was exhibiting problem behaviors such as crying and biting other people. Ms. Castellani supervised the Student and the staff working with him at CCCD at least one hour per day during the fall of 2004. She also reviewed his data and previous evaluations. She believed the Student made progress while at CCCD. He developed the ability to attend and to wait for delivery of a reinforcer. He responded well to a token system. His spontaneous requests went from four per day to almost 50 per day. His biting also decreased significantly. (Testimony of Ms. Castellani)

68. CCCD has a “written service plan” for students who are unilaterally placed at CCCD, and they use IEPs for those students with LEA placements. The Student’s written service plan contained 30 objectives. Out of the 12 objectives that had been implemented from September 2004 to January 2005, he made satisfactory progress on 11 objectives. The progress report and the data indicated that he had overall made satisfactory progress across all areas. According to CCCD protocol, Christine Marino, Board Certified Associate Behavior Analyst, and the special education teacher reviewed the school district’s paper work in developing a written service plan for the Student. CCCD’s program addressed speech and language issues, fine motor skills, and gross motor skills. CCCD has a speech and language consultant, Karen Anthony, who was on staff when the Student was in attendance.

69. Ms. Castellani stated that in her opinion, the Student would not benefit from being educated with non-disabled peers. He lacked the prerequisite skills that he needed to gain improvements and skills from being with non-disabled peers. He was not able to look at the other children and observe what they were doing, even in their highly structured setting. (Testimony Ms. Castellani)

70. Ms. Judy Palazzo is the Clinical Director at CCCD, and is a Board Certified Behavior Analyst. Ms. Palazzo's role in the implementation of goals and objectives developed for the Student was overseeing the process and establishing that there was adequate assessment. She also worked directly with the Student at least one full day every two weeks. Ms. Palazzo met with the Student's CCCD team on a regular basis and also met with his Mother. Ms. Palazzo described her first impressions of the Student as "very deceiving initially because he does talk a good amount, he also had some spontaneous eye contact with people, sat nicely, and was very compliant." After working with the Student, however, CCCD learned that, although the frequency of his requests were very high, he was only requesting a couple of things and repetitively. When the staff tried to work with him on receptive language tasks that did not require requesting, the talking interfered with this ability to attend to other things. (Testimony of Ms. Palazzo)

71. Ms. Palazzo also observed that the Student had trouble following instructions, being able to keep his attention to any task in the environment, and did not listen very well to others. For example: he would say "my turn, my turn, my turn," but he would be looking off in a completely different direction without tying it functionally to the task. Also, though he did have spontaneous eye contact and did notice when people came into the room, it was very fleeting. The Student would often look up at the lights, which is a perseverative behavior that will interfere with learning. Ms. Palazzo thought that he looks at the lights when he is presented with certain materials or tasks that might be too hard for him. (Testimony of Ms. Palazzo)

72. Over time, CCCD realized that the Student would bite if he didn't get something that he wanted, or if he had to leave a preferred activity. The CCCD team then tried to promote more functional communication around leaving and getting him to transition away from things. (Testimony of Ms. Palazzo)

73. Ms. Palazzo was asked to read the testimony of Ms. Neal, the Student's teacher. Ms. Palazzo's impressions when she read the transcripts were that Ms. Neal and she saw similar behaviors, but Ms. Neal did not realize just how deceptive the Student's presentation was. She felt that the district staff did not tease out the frequency of requesting versus the types of requesting that were done in identification of deficits. As to Ms. Neal's testimony that the Student would cry in her class out of "empathy" for other students, Ms. Palazzo indicated that there is no data to support that, but that there is ample data showing that when other children cry, the Student would cry. After working with hundreds of children with autism, Ms. Palazzo stated that it is very uncommon for a student with autism at the level the Student was at and at his age to have the trait of empathy. (Testimony Ms. Palazzo)

74. Ms. Palazzo felt that at the time the Student came to CCCD he was not prepared to benefit from inclusion with typical peers, mostly because of his limited ability to attend for any

decent period of time. For the Student to be ready for inclusion, she felt that he should be able to attend to people and activities for longer periods of time, be able to follow instructions alone and within a group, be able to stay engaged at least for a period of time, and be able to participate in turn-taking activities. These areas were not filled in by the time he left CCCD, but he was making progress towards that goal. (Testimony of Ms. Palazzo)

CONCLUSIONS OF LAW:

1. There is no dispute that during all times at issue here, namely the 2003-2004 and 2004-2005 school years, the Student was entitled to receive a free and appropriate public education (“FAPE”), including related services, through the Board pursuant to the IDEA, 20 U.S.C. Secs.1401 *et seq.*, and its implementing regulations codified at 34 C.F.R. Secs. 300 *et seq.*, and under Connecticut’s special education laws, Conn. Gen. Stat. Secs. 10-76. *See, e.g.*, B-15, B-18, B-19, B-21, B-22, B-24.
2. The Act defines FAPE as special education and related services which:
 - “(A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized education program required under Sec. 614(d).” 20 U.S.C. Section 1401(8).
3. Connecticut Regulations provide that “the public agency has the burden of proving the appropriateness of the child’s program or placement or of the program or placement proposed by the public agency.” Conn. Reg. 10-76h-14
4. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al. v. Rowley*, 458 U.S. 176 (1982), 102 S.Ct.3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.
5. Addressing the *first* prong of the *Rowley* inquiry, the initial procedural inquiry is not a formality. As the Supreme Court noted in *Rowley*, Congress’s emphasis in IDEA “upon full participation of concerned parties throughout the development of the IEP,” together with the requirement for federal approval of state and local plans, reflects a “conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” 458 US at 206 *Walczak v.*

Florida Union Free School District, 142 F.3d 119 (2nd Cir. 1998) The procedural guidelines of IDEA are designed to guarantee that the education of each child with disabilities is tailored to meet the child's unique needs and abilities. 20 U.S.C. Secs. 1412 and 1415. These procedural guarantees are procedural safeguards against arbitrary or erroneous decision-making. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1041(5th Cir. 1989). However, a procedural violation of the IDEA does not, in and of itself, warrant a change in the child's educational placement. In order to conclude that procedural violations resulted in a denial of a free appropriate public education, the parent must show that the procedural errors resulted in a loss of educational opportunity. See, *Burke County Bd. of Educ. V Denton*, 895 F.2d 973, 982 (4th Cir. 1999); *Evans v. District No. 17 of Douglas County Nebraska*, 841 F.2d 824, 830 (8th Cir. 1988).

6. In this matter the nature and volume of the procedural violations warrants a finding of a deprivation of FAPE. The procedural violations include:

A. Failure to provide agreed upon independent evaluation with Dr. Michael Powers:

An independent educational evaluation (IEE) was requested by the Mother at the April 27, 2004 PPT. (B.18) The Team, including the Mother, agreed that Dr. Michael Powers would be an appropriate person to do the evaluation. The Parent was requesting this be a comprehensive evaluation to help to resolve disputes surrounding eligibility category as well as programming. On May 6, 2004, when the Mother received the April 27, 2004 IEP, she wrote to Ms. Todd and outlined her understanding of where the evaluation stood. (P.13, pg. 3, Item 10) She sent numerous other letters after communicating with Dr. Powers' office, to make sure that a full day observation was scheduled and that Danbury had confirmed with Dr. Powers that they would fund the evaluation. (P.9-P.12) When the May 27, 2004 PPT convened, the Mother told the PPT that Dr. Powers' office would not schedule the evaluation until Danbury confirmed payment. (P.36, pp. 43-47) In response, the Mother learned for the first time that the observations would not occur until the fall. The Mother sent a letter to Ms. Todd immediately following the May 27 PPT indicating her concerns about another four month delay, and requesting that the Institute for Educational Planning, LLC in Milford conduct the IEE. (B.14) On June 7, 2004, Ms. Todd wrote to the Mother, stating "we are denying your request and will proceed with Dr. Powers' evaluation." (B.13) On July 14, 2004, the Mother suggested yet another person to do the IEE, Dr. Anita Breslin, who was immediately available, rather than in the fall. (B.7) Again, the district refused. (B.5) On July 30, 2004, the Mother received a letter from Dr. Powers' office stating that SHE was "responsible for payment in full for the evaluation."

A Parent's entitlement to an IEE is described at 20 USC 1415(B)(1). Further, section 300.502(b)(2) of the regulations states that "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) initiate a hearing under §300.507 to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria." Therefore, if a parent elects to obtain an IEE by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for IEEs or there is no justification for selecting an evaluator that does not meet agency criteria. If

the public agency chooses not to initiate a due process hearing, it must ensure that the parent is reimbursed for the evaluation.

The United States Office of Special Education Programs (OSEP) has issued a policy letter, *Letter to Parker*, that clarifies that the choice of evaluator rests with parents. Once a school district has agreed to an IEE, if it disagrees with the parent's choice of evaluator the board must take the issue to due process. This did not happen here so the Board is found to have acquiesced to the Parent's choice of evaluator, Dr. Breslin. *Letter to Parker*, Office of Special Education and Rehabilitative Services, 41 IDELR 155, 104 LRP 30069, February 20, 2004.

Therefore, the Danbury Public Schools violated the Parent's procedural safeguards when they denied the Mother's request to have the IEE performed by an individual of her choosing after she realized that Dr. Powers' schedule was prohibitive. The Board did not, at any point after being informed by the Parent that she no longer agreed with Dr. Powers as the IEE, bring Due Process to defend its evaluation, as required by law. Instead, it simply allowed time to pass as the Mother became more upset and frustrated with the lack of an outside evaluation to resolve the disputed issues. Eventually, the district did not even keep the Dr. Powers evaluation they had been so insistent upon, but rather hired Dr. Javornisky, whose recommendations they apparently never reviewed or followed, since his recommendation that the Student is not ready for interaction with typical peers is obviously not consistent with the IEP which remained the offer for the 2004-2005 school year even after they received his report.

B. Failure to consider the information provided by the Parent at PPTs:

This was described in great detail in the Mother's testimony. The IDEA absolutely requires that an IEP Team consider information provided by the parents of a disabled child. An IEP Team shall "review existing evaluation data on the child, including evaluations and information provided by the parents of the child..." 20 U.S.C. 1414 (c)(1)(A). The language is clear. Convening a PPT is not enough; what actually transpires during the PPT must be considered. School districts do not get to pick and choose whether they will consider information provided by the parents. They may choose not to implement the recommendations contained therein, but they can not just fail to consider it as they did here. Routinely, the Mother would ask that information she provided from outside evaluators be reviewed and considered by the PPT, and it was regularly not done.

C. Failure to ensure the full participation of the Parent at PPTs:

While the Mother certainly attended, and indeed requested, many PPTs for the Student (eight in eight months), it is clear that school district did not allow her to meaningfully participate or treat her as a true member of the "Team." A review of the Mother's testimony, and of the three PPT transcripts in evidence (P.36, P.37, P.38) demonstrates that the Mother had a difficult time even getting a word in edgewise.

A classic example of the way in which the Danbury Public Schools attempted to thwart the Mother's ability to be a meaningful participant in the Student's PPT meetings can be found in the transcript of the May 27, 2004 PPT where the Board refers to the length of the PPTs, with the thinly veiled subtext being "of course you have the right to ask for PPTs and advocate for your child but you do so at the expense of your child and other disabled children." This has a chilling effect on parents, and rises to the level of a serious procedural violation.

D. Failure to maintain continuum of appropriate alternative placements:

The Mother was initially told when she met with the district that the two options for placement for the Student were the program at Mill Ridge or the program at Hayestown. The Board seemed to feel that the Hayestown program was too restrictive, and the Mother did not think the Mill Ridge program was restrictive enough. A Parent should not be faced with a “lesser of two evils” approach to an individualized program. Programs are to be designed based on the individual needs of students; students aren’t to have to “fit” into the available programs. This approach is a violation of 34 CFR 300.115.

E. Failure to timely complete evaluations:

The Mother signed consent for a full battery of evaluations at the October 23, 2003 PPT. Those evaluations were not completed and reviewed until the April 1, 2004 PPT. (B.19) This procedural violation clearly deprived the Student of appropriate services, as Ms. Todd refused to provide the Student with his much needed occupational and physical therapy until the evaluations were completed and reviewed. Moreover, given that the initial central point of disagreement between the parties was the identification, the Board missed the opportunity to win the Mother’s trust and engage her as a full member of the team.

7. In analyzing the harm caused by these violations, it is helpful to consider the primacy that Courts have placed on compliance with the procedural requirements of the Act. The procedural guidelines of IDEA are designed to guarantee that the education of each child with disabilities is tailored to meet the child's unique needs and abilities. 20 U.S.C. Secs. 1412 and 1415. These procedural guarantees are not mere procedural hoops, but procedural safeguards against arbitrary or erroneous decision-making. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1041(5th Cir. 1989). IDEA and its regulations require "a full and individual evaluation" of the child's educational needs to be conducted before the initial placement of a child with disabilities is made. 34 CFR 300.531. An appropriate program begins with an IEP, which accurately reflects the results of evaluations to identify the student’s needs. *Board of Education of the City of New York*, 28 IDELR 1093 (NY SEA 1998). In addition to the requirement to evaluate the child, the IDEA regulations mandate other procedures to be followed in making placement decisions. (a) In interpreting evaluation data and in making placement decisions, each public agency shall-(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) Ensure that information obtained from all of these sources is documented and carefully considered; (3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (3) Ensure that the placement decision is made in conformity with the LRE rules in Secs. 300.550-554.34 C.F.R. 300.533. In the instant matter, the Board did not even invite their own ABA consultants to the April PPT, in spite of the fact that both of them had been involved with the Student’s program by this point. If reviewing the reports of the District’s own two critical experts is sufficient then the whole PPT process could be conducted on the papers, which is clearly not allowed. IDEA requires a forum in which there can be a collaborative sharing of information and ideas and in which the parent is an equal participant.

Board staff have access to their consultants on a frequent basis during the course of the school week. Parents do not. Often the PPT provides the only opportunity the parent has to have an exchange of ideas and concerns with these consultants.

8. In *Amanda J. v. Clark County School District*, U.S.C.A (9th Cir. 2001), a matter also involving a dispute regarding the appropriateness of programming for a child with autism, the Court eloquently spelled out a school district's procedural obligations as follows:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know...By mandating parental involvement...Congress sought to ensure that the interests of the individual children were protected. See *Rowley* 458 U.S. At 208. Not only will parents fight for what is in their child's best interests, but because they observe their children in a multitude of different situations, they have a unique perspective of their child's special needs...The critical nature of the provisions requiring and protecting parental involvement is highlighted when they are considered in light of the [stated purposes of the IDEA](#). To accomplish the IDEA's goal of ensuring that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs," 20 U.S.C. § 1400(d)(1)(A), those individuals who have first-hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. The procedural safeguards facilitate this objective.

While the Court recognized that not every procedural violation leads to a deprivation of FAPE, it also found that

Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed.

After finding that the Board had violated Amanda's procedural rights, the Court determined that it was unnecessary to even address whether, substantively, the Board had offered an appropriate IEP, as the violations constituted a *per se* denial of FAPE:

Given the importance of the IDEA's procedural safeguards, it should be of no surprise that when a school district or other state agency violates "the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE." *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1485 (9th Cir. 1992)... Because we hold that the District failed to develop the IEP in accordance with the procedures mandated by the IDEA and that this failure in and of itself denied Amanda a FAPE, we do not address the question of whether the proposed IEPs were reasonably calculated to enable Amanda to receive educational benefits.

9. The second *Rowley* test is whether the IEP was reasonably calculated to enable the child to receive some educational benefit. “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Board of Educ. v. Rowley*, 458 U.S. 176, 200, 102 S. Ct. 3034, 3048 (1982). The IDEA “does not [require the Board to provide] the best education money can buy. . . .” *Lunceford v. District of Columbia Board of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984) (Ruth Bader Ginsburg, J.); to provide a level of services that will maximize the potential of disabled children; *Rowley*, 458 U.S. at 196, n.21; *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 132 (2d Cir. 1998); or to provide an education “that might be thought desirable by ‘loving parents.’” *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989); *see also, Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988) (“proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act”). However, since *Rowley*, courts have clarified the requirements of FAPE to hold that IEPs must provide more than a trivial educational benefit. (See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), Cert. Denied 488 U.S. 1030 (1989) and *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3rd Cir. 1993)). The benefit cannot be trivial, but must be “meaningful” benefit. As has been reiterated in our Circuit, “Congress did not intend that a school system could discharge its duty under the IDEA by providing a program that produces some minimal academic advancement, no matter how trivial.” *Mrs. B. v. Milford Board of Education*, 103 F. 3d 1114, at page 1121, citing *Hall v. Vance County Board of Education*, 774 F. 2d 629 (4th Cir. 1985)

10. Keeping in mind that the burden was on the Board to prove that the Student was making progress, the evidence shows that the Student was not making “meaningful” progress in the Board’s programs. In spite of conclusory statements by many of the Board witnesses that the Student was doing well, there is virtually no objective evidence in the record that supports this. Ms. Neal claimed that the district was maintaining strict data on the Student’s ABA programs but did not retain and produce this even though the Mother’s concerns were clearly made known to the Board from early in the Student’s program. Also, both Dr. Breslin, the outside evaluator retained by the Mother and Dr. Javornitsky, the outside evaluator retained by the Board both questioned in different ways the educational benefit that the Student would derive from modeling behaviors of other children, one of the primary reasons put forth for a more inclusive educational setting.

11. The central conflict in this matter was a difference of identification and the programming that flows from it. According to the Board’s Director and the Board’s Special Education Supervisor, a change in the label would have had no impact on the services provided to the Student, as the Board informed the Parent. (3/24/06 Tr. Todd; 9/25/06 Tr. Emmett) Certainly this is a correct reflection of what the law requires. However given a whole team firmly committed to another identification, even at the point when there were only evaluations by the Parent and none by the Board, it is not credible that an ID label would not influence service providers’ expectations of the Student.

It appears that the Board staff was put off by the Mother changing her mind the day after the December PPT and waiting until after that PPT to inform the Board of her two private

evaluations. By the time of the third PPT, in January, the Board members who testified did not appear to give any real consideration to the evaluative material the Mother produced, albeit somewhat late.

12. First, an evaluation that is six months old is not generally considered stale. This is particularly true because the program being advocated by the Board in January was the same one they were proposing in December when the evaluation was only five months old, so although they did not have the evaluation for the December PPT, it does not appear that it would have influenced their decisions. It is not uncommon for a month or more to transpire between the completion of parts of evaluations and the convening of a PPT at which the evaluations are relied upon. So while six months is a little long, it is not so long that the evaluation is not rendered unreliable or otherwise without value because that length of time has transpired. Lastly, the Board had been given the opportunity to evaluate this child and they delayed doing so for months so the evaluations provided by the Parent were the best that were available for planning for this child. While the observation of the child by the special education teacher is also important, the informal nature of Ms. Neal's reporting and the lack of reliable data to support it render it far outweighed by the comprehensive nature of Dr. Prather's evaluation, particularly when considered along with Dr. Solomon's earlier evaluation.

13. There is no doubt this was a challenging parent. Her repeated instances of changing her mind, her inexplicable delay in sharing evaluations with the team, her numerous letters to the Board, the large number of long PPTs, the additional team meetings that included the Mother, the Mother's multiple observations and her quiet spoken but strong-willed demeanor were no doubt difficult for the Board staff to deal with. Also, it is no doubt difficult, and certainly inappropriate, for the Board to be delivering an ever escalating program of services that in their professional judgment was not appropriate. However, much of this would have been avoided if the Board did a timely evaluation when they themselves first intended, in October 2003, after the first PPT. Instead, they placed the Student in a program with which they disagreed and to which the service providers were not committed. The fact that the Board kept increasing services in numerous small increments was actually contorting the PPT process in that it was teaching the Mother that the amount of service is related to the number of PPTs and it was making the Board members feel that they were repeatedly giving in to types and levels of service that they did not feel were appropriate. The case, more than most, cries out for a timely independent evaluation because by the time the Board completed its own evaluation the Mother did not trust the Board and understandably so. She came into the process with two evaluations that told her that her very seriously disabled only child had to receive an intense level of service to determine his correct identification and with the knowledge that if his correct diagnosis was autism then the clock was loudly ticking on the window of opportunity to help him learn crucial skills. The Board's failure to complete their own evaluation in a timely manner and subsequent failure to arrange for the agreed upon independent evaluation in a timely manner were very serious procedural violations that denied this Student FAPE.

FINAL DECISION AND ORDER

Student's Issues:

1. The Board did not develop and implement an appropriate program for the 2003-2004 and 2004-2005 school years or for the extended school year services for 2004.
2. The Board has violated the Student's procedural safeguards, including failure to provide an agreed upon independent evaluation.
3. The Board responsible for reimbursement of evaluations and services privately obtained by the Parent, including the Student's unilateral placement at CCCD.

Board's Issue:

1. There having been no finding of unreasonableness on the part of the Parent, there is no basis to reduce her recovery.