STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Greenwich Board of Education

Appearing on behalf of the Student: Attorney Lawrence W. Berliner
Klebanoff & Alfano, P.C.
433 South Main Street, Suite 102
West Hartford, CT 06110

Appearing on behalf of the Board: Attorney Abby R. Wadler
Assistant Town Attorney
Town Hall – Law Department
101 Field Point Road
Greenwich, CT 06830

Appearing before: Attorney Christine B. Spak, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the 2004-2005 and 2005-2006 IEPs of the Greenwich Board of Education [hereinafter, the Board] provide the Student with a free appropriate public education?
2. If not, did the Student's placement at Eckerd Youth Initiative, Oakley School, and/or Aspen Achievement Academy provided the Student with a free appropriate public education?
3. If so, is the Board responsible for the costs of such placements?
4. Is the Parent entitled to receive an award of compensatory education to remedy the Board's violations of the Parent and Student's procedural rights?

SUMMARY:

The Student had had difficulties in school beginning in elementary school which increased in sixth grade. In sixth grade there began a series of Pupil Study Team meetings to address the Student's educational problems. In April of his eighth grade year (2004) he was first identified as eligible for special education services. His identification was other health impaired with ADHD being a primary factor. His Parent maintains that his IEP was inappropriate and that he was not receiving a free appropriate public education. His behavior and academic performance continued to decline. In March of his ninth grade year (2005) he was arrested for possession of drug paraphernalia and the Parent made a unilateral placement to the Aspen Achievement Academy in Utah. From there the

Student transitioned to the Oakley School and when he left there for noncompliance he went to the Eckerd Youth Initiative in Florida in September 2005 where he remained throughout the hearing process.

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 HISTORY:

This request for due process was received on January 10, 2006. The prehearing conference was conducted on January 17, 2006. The Board was not available but after some correspondence mutually agreed hearing dates were selected. The hearing was conducted on February 2, 14, 17, 28, March 7, 21, 28, April 3, 10, 13 and 19th. The parties agreed to an extension of the date for mailing of the final decision to accommodate the need for more hearing dates and the filing of briefs and reply briefs. The last brief was received on May 12, 2006 and minor corrections were made to it on May 18, 2006. The date for mailing of the final decision in this matter is June 17, 2006. Witnesses who testified were the Father, Dr. Richard Tomanelli (privately retained psychologist), Patrick Curley (Director of Eckerd Youth Initiative), Iris Anorga (Headmistress of the Board's school), Jeff Van Cleve (Instructor at Aspen Academy), Mary Ann Tedesco (Board Secretary), Helen Blackburn (Board Psychologist), Dr. Jo Frame (Assistant Principal, Board's Middle School), Jane Pearl (Board's Middle School Administrator), Lisa Hudson (Board's School Psychologist), William Dineen (Board's Resource Room Teacher), Mary Forde (Board's Director).

FINDINGS OF FACT:

1. The Student was born on February 22, 1990 and was 15 years old at the commencement of this hearing.

2. He is a handsome, bright, intense and creative boy, well liked by his peers and staff. Testimony of Dineen, testimony of Tomanelli.

3. In fourth grade a Pupil Study Team (PST) was conducted on February 3, 2000. A PST is a meeting consisting of Board staff and it is convened by request of Board staff, typically a classroom teacher. The minutes of this PST noted that the Student didn't complete assignments, was fresh and manipulative, was looking for attention, was distracting to self and others and was artistic. The recommendations were to do a time off task analysis, go to PPT and develop a behavior plan. A PPT was recommended but none was convened. In fact a PPT was not convened until **four years** later (January 23, 2004) when the student was in eighth grade. P-34, P-35, B-10.

4. In sixth grade the Board convened a series of PSTs that were held during sixth, seventh, and eighth grade to discuss concerns over the Student's attention, academic, behavioral, and social issues. B-2 to B-7.

5. Academic concerns as identified in the Board's February 15, 2002 and May 17, 2002 Requests for PST included "very poor grades", 'easily distracted', 'poor classroom participation' and 'cannot work independently'. P-32, P-30.

6. The October 25, 2002 PST minutes note that all previous strategies were ineffective.

7. There were references in the minutes of the June 14, 2002 and November 3, 2003 PST meetings to refer the Student for an evaluation. B-4, B-6.

8. The Board did not refer the Student for an evaluation until after a PST meeting on January 20, 2004. B-7, P-24.

9. The Student's behavior and academic performance remained poor during his sixth (2002-2003), seventh (2003-2004) and eighth (2004-2005) grade years. B-1, p. 30. His parents were going through a divorce in his sixth grade year and by all accounts this was hard on him. His father aptly described his bright, capable son during this three year period as "bumping along the bottom."

	Sixth Grade	Seventh Grade	Eighth Grade
Language Arts	D	D	D+
Math	C	C+	F
Social Studies	D	C-	D
Science	C+	D+	
Spanish	B+	B-	F
Art	A-		B
Band	A		
Chorus		B	
Technology			A

10. In the two school years that transpired between September of his seventh grade year and May of his eighth grade year he dropped from the 91st percentile in his Degrees of Reading Power (DRP) test score to the 7th percentile. In May of his seventh grade year he had already dropped to the 82nd percentile. B-1, p. 32. This "utter collapse" in his reading scores was another indication of the long standing and worsening needs of this student. Testimony of Tomanelli.

11. The PST minutes from January 20, 2004 recommended a psychological, educational and social evaluation. On January 23, 2004 the Board, for the first time, convened a PPT for this child, four years after the Board recommended that the Board convene a PPT. Incredibly, for a very extended period of time the Board was not following the advice of its own professionals. The Mother signed the consent to evaluate on that same day. P-24, P-23, P-22.

12. The Parents have an older son and a younger daughter. The older son had ADHD problems that the Father described as similar in nature to the Student's but worse in intensity. The Father sees fewer issues of distractibility and focus in the Student as compared to the older son. The older son had participated in the Board's Comprehensive Support Program (hereinafter CSP). The Father was opposed to pharmacological intervention for the Student, as he had been for the older son. The Father had sought a court order to prevent his older son from taking medication but did not prevail as against the position of the Mother. The older son had then started on medication and had experienced paranoia, depression, insomnia, teeth grinding and nausea. The older son then took himself off the medication even though he continued to do poorly in high school but has since gone on to have a successful start in college in another state and is a B student. Because the Father did not want the Student started on medication for ADHD, the Father did not complete the paperwork requested by the School as part of the evaluation of the Student. Testimony of Father.

13. The initial multidisciplinary evaluation of the Board was completed on March 5, 2004**.** The first PPT at which it was discussed occurred on April 13, 2004. The Student was identified as eligible for special education services at the April 13, 2004 PPT. "[The Student] is eligible for special education as Other Health Impaired with ADHD as the qualifying condition." B-16.

14. The IEP was set to be implemented on April 22, 2004. P-21, B-16.

15. The Father wrote to the school three days after the PPT, on April 16, 2004, stating that he disagreed with the diagnosis, and requested that the child's services not be altered, essentially invoking stay put. In that letter the Father also stated "It is my desire that an outside professional be employed to evaluate my son, including a neurological evaluation which was absent form [sic] the schools [sic] incomplete testing procedure." B-54. The Board never acted on this request for an independent evaluation.

16. The Father also filed for a due process hearing on April 21, 2004. B-18.

17. That hearing was dismissed without prejudice, on June 4, 2004 because of the Father's failure to prosecute in a timely manner B-18.

18. The Father then refiled for due process in June 2004 and requested that the educational services remain unchanged, essentially invoking stay put again. B-54, p.12.

19. A hearing was scheduled for September 3, 2004. B-54, p. 22.

20. On September 2, 2004 the Father requested that the hearing be dismissed and it was dismissed on September 9, 2004. P-42.

21. Any claim by the Father that the delay in providing services during the time period between the filing of his first due process request (April 21, 2004) and the dismissal of the second (September 9, 2004) is completely without merit. That portion of the delay in providing services is completely due to the actions of the Father in filing two due process requests containing two requests for stay put, in rapid succession.

22. With the stay put order lifted on September 9, 2004, the school immediately arranged for PPT on September 24, 2004. That meeting, at which both parents were present, determined that the child was eligible for special education in the high school and implemented the IEP. Identifying this child at the September 24, 2004 PPT was unnecessary because the Board had already identified the student as eligible for special education services on April 13, 2004. Therefore, making the determination of eligibility for a second time indicates that there was a significant lack of communication between the middle and high school special education staffs; in essence, given that the high school PPT team didn't even know the most basic fact that Student had already been identified, it is a safe conclusion that the high school PPT team was very unfamiliar with this student and his needs. B-19

23. At the September 24, 2004 PPT the Board developed three annual goals and objectives that would address homework completion, increase academic work production, and commence post secondary planning. The first goal was "[The Student] will complete homework assignments in a timely manner 80% of the time by June", the second goal was "Commence post-secondary planning by June" and the third goal was "Increase academic work production." B-9(6),(7),(9).

24. Annual goal number two, did not contain any short term objectives and there should have been objectives. B-19, Testimony of Anorga.

25. The total services implemented in the Student's 2004-2005 IEP were six hours of resource room assistance in an eight day cycle and 30 minutes of counseling per eight day cycle (18 minutes a week), although the school psychologist was not responsible for any of the goals. B-19.

26. In fact, the Board did not propose any goals and objectives that would address the Student's anxiety, depression, coping skills and behavioral or emotional symptoms that were reported in the Board's own initial evaluation and had been reported on this child in one form or another by the Board's own staff since fourth grade. B-12(10),(11), P-34, P-35, B-10, Testimony of Tomanelli.

27. The Student was definitely not supportive of going to resource room initially but that changed dramatically. The resource room became very important to the Student. He liked the structure there and was able to focus, get work done and learn in the resource room. He was well behaved and cooperative. This was testified to by Board witnesses and not disputed by anyone. A computer was central in helping the Student focus and get under control. However the resource

room did not have enough computers for the students. In fact, the Resource Room had only two computers to begin with and one was broken for the entire 2004-2005 school year. It remained broken in spite of the Resource Room teacher's repeated requests that it be fixed. Testimony of Dineen, testimony of Anorga. After questioning by the hearing officer the resource room teacher added that there was a computer lab down the hall from the resource room and the students had to be escorted down the hall to the computer lab on the occasions when they needed a computer or they could bring in their own laptop. It is concluded that there were not enough computers for the special education students who needed them and this situation persisted for the entire year; that the alternate plan of escorting students to the computer lab was inappropriate, inefficient and disruptive; that this student needed a computer to receive appropriate educational benefit; that the need for a computer was not in his IEP but it should have been; and that the computer should have been provided by the Board so that the student could receive a free, appropriate public education,

28. In the Resource Room the Student was getting his tasks completed and his self esteem improved. Testimony of Dineen.

29. Problems the Student experienced in regular education continued. The Student continued to be impulsive and fidgety and have difficulty sitting still and focusing on a task; he continued to be tardy, absent and when in regular classes withdraw by putting his head down. The Student's World Themes teacher wrote the Father on October 8, 2004: "My initial opinion that he [the Student] is being defiant in not doing the work is giving way to maybe he is not able to concentrate long enough to do an assignment of length." P-37, p. 19. He did not do this in the resource room and continued to go to the resource room willingly. Testimony of Dineen, Testimony of Anorga, Testimony of Father, Testimony of Tomanelli, B-27.

30. The Father started the Student in therapy and in private tutoring, both at the Father's expense. The Father emailed the Board's staff in an effort to support the staff in their efforts to educate the Student and to maintain communication. The Father had approximately 70 emails with the Board personnel in a period of "much less than a year". Testimony of Father.

31. The goals and objectives did not contain any statement or dates for reporting progress to the Parent. B-19(6), (7), (9). However, on the ninth day of hearing, (April 10, 2006), the Board did produce a document that purported to be the progress reports on the annual goals. B-53. The explanation for why this had not been produced before, and why it was handwritten was because the Resource Room Teacher did not have a computer available. None of the Board witnesses could not account for the reason that dates for reporting progress were in B-53 but not B-19 or P-18, nor could they explain why goal number two in B-19 and P-18 did not have any objectives whereas, B-53 had contained a short term objective. Testimony of Dineen, testimony of Anorga.

32. The Board reported satisfactory progress on goals and objectives on the two reporting period listed. B-53. For the same time period the Board's report card, B-27 recorded one "D" and two "F's" for the first marking period and four (4) "F's" after the second marking period.

	Ninth Grade 1st Semester	Ninth Grade 2nd Semester
Language Arts	F	F
Algebra	A-	C+
Social Studies	F	F
Science	D	F
Clay	C+	C+

B-27

To the extent that the Board's position is that the Student was making satisfactory progress, that position is not credible and is without merit.

33. A review of the Student's report cards reveals that, with the exception of math, the Student's grades, which were fair to poor throughout middle school, declined further once the Board finally implemented a program. B-1, pg. 30, B-27.

34. Taken as a whole, the testimony and documentation provided by the Board on the goals and objectives is not at all credible and is not given any weight. The documentation, as described above, is inconsistent with itself (for example, different versions showing up, some not until days into the hearing), is not completed properly (for example, a goal with no objectives) and is not at all consistent with the Student's report card grades.

35. The Board convened a PPT on December 13, 2004 to review the Student's IEP. The did not change the goals or objectives and they did not recommend further testing or evaluations. B-24.

36. The Resource Room teacher stated that the goals and objectives were not revised at the December 13, 2004 PPT, because the September 24, 2004 goals and objectives remained appropriate even though the report card grades were poor and failing and regular classroom behavior was noncompliant. Testimony of Dineen.

37. Despite having a report card with declining grades and the disciplinary referrals, the Board did not recommend any further evaluations or testing at the December 13, 2004 PPT, only an increase in resource room time from six to ten periods per eight day cycle. According to the school psychologist, the Board did not request another evaluation because the Board's March 5, 2004 initial evaluation contained enough information. Ms. Anorga testified that additional testing was not necessary because the March 5, 2004 evaluation, B-12, had current testing information for the December 13, 2004 PPT. Testimony of Anorga, testimony of Blackburn, testimony of Dineen, B-24.

38. Counseling as a related service of one half period per eight day cycle or eighteen (18) minutes per week from the September 24, 2004 IEP remained the same. B-24(4).

39. The Father did not attend the December 13, 2004 PPT meeting. B-24. The Board sent notice of this PPT meeting to the Student's parents at 300 Orchard Street, Greenwich, CT 06830. B-48, Tedesco Testimony. However, the Father testified that he did not reside at that address and his mailing address was 500 Group, Inc., 700 Canal Street, Stamford, CT 06902. Father Testimony. B-16, B-17. The Father testified that his correct mailing address had been provided to the Board on many occasions and it had been his "stable address" for over eight (8) years. Father Testimony [1] The Board had the Father's mailing address during the 2003-04 school year B-16, B-17, P-36, but it could not adequately explain the reason that it did not have the Father's mailing address during the 2004-05 school year. There seemed to be no system for communicating correct addresses from the middle school special education department to the high school special education department, and little concern about correcting the problem. Testimony of Anorga, testimony of Dineen, testimony of Tedesco. Consequently, the Father did not attend the December 13, 2004 PPT, did not receive notice of that meeting or a copy of written prior notice, or any procedural safeguards, or the results of the IEP. Father Testimony; B-24.

40. The Resource Room teacher made a referral to DCF when he was concerned about an incident of fighting between the Student and his older brother, both high school students at the time of the incident. Testimony of Dineen.

41. The Board recorded several disciplinary referrals during the period November 1, 2004 to March 2, 2005. B-22, B-23, B-25, B-26, B-29. These were for such infractions as cutting class, teacher insubordination, and using the faculty men's room. There was no concern about violence raised by any of the witnesses. The Student was arrested for possession of drug paraphernalia on March 4, 2005. B-29. In the documentation generated by the Board which includes the PST Meeting Record of March 4, 2005 and the Board's post-hearing brief, the Board persists in incorrectly identifying the arrest as being for possession and use of drugs rather than paraphernalia. B-30, Board's Brief at 4. This is a further indication that this Board remained very unfamiliar with this student and his problems and needs even after providing service for more than half of the school year.

42. The Board convened a PPT meeting on March 14, 2005 to review the Student's IEP. B-32. The Father did not attend this PPT meeting because the Board sent

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[1] The Parent and the Student's mother were divorced during 2002 and live at separate addresses.

notice of this PPT to 300 Orchard Street, Greenwich, CT 06830, and not to the Father's mailing address at 500 Group, Inc., 700 Canal Street, Stamford, CT 06902. [2] Consequently, the Father did not receive notice of this PPT, the IEP, his procedural safeguards, and the written prior notice since the Board sent them to only the Student's mother at her address. B-32, Father Testimony. The Board used the address listed on the Board's "IEP Level I" form for mailing purposes. Testimony of Tedesco.

43. The Student's mother informed the PPT that the Student had been placed at the Aspen Achievement Academy in Utah and she signed the Board's withdrawal forms. B-32, B-31.

44. The Board acknowledged that the Student was not making sufficient educational progress at least by March 2005 but their position was that he needed the Board's self contained program, the Comprehensive Support Program (CSP). Testimony of Anorga. The Board agreed that the "Areas of Concern" as of a March 4, 2005 CPST Meeting were;
"Failing grades, acting out and depressed. Severe ADHD.
Puts down head in class, challenges teachers.
Will work in Resource Room, but not outside there.
Recent 5 day suspension for illegal drug use.
Previously suspended for 3 days.
Impulsive and angry as described by Helen Blackburn.
Has mental health support 1x cycle.
Little family support for difficulties." B-30 at p.2.
The Headmistress agreed that these were an accurate description of the concerns the staff had about this Student. Testimony of Anorga. None of the Board witnesses could explain what the basis was for "Little family support for difficulties." Given that every PPT was attended by one or both parents, that the Father exchanged approximately 70 emails concerning this Student, and the Father had provided tutoring and therapy by this point in time at his own expense, it is concluded that this statement is inaccurate as well as insulting. This certainly undermines the collaborative scheme anticipated by IDEA.

45. The Parents were familiar with CSP because their older son had attended it and they did not feel it was appropriate for the Student's needs. Testimony of Father, testimony of Anorga, testimony of Dineen.

46. The results of this PPT were sent to the Student's mother, B-32, and the Father did not learn of the Student's withdrawal until several months later. Once the Father had learned of the results of the March 14, 2005 PPT, he wrote the Board on September 30, 2005 on his business letterhead informing the Board that he had

[2] It appears that the Board had the Parent's mailing address for the September 24, 2004 PPT, B-42 and he attended that meeting. B-19.

disagreed with the outcome of that PPT and requested the Board to place the Student at Eckerd Youth Initiative and requested reimbursement for the costs of that program and Aspen Achievement Academy and Oakley School. B-35.

47. Upon leaving the Board's high school the Student was entered into the Aspen Achievement Academy, a wilderness program where he demonstrated tremendous resistance to compliance. He did not want to be there and exercised passive resistance day after day. A typical stay is 45-50 days and the Student stayed there 82 days which is unusual. The instructor who testified for Aspen does not have a college degree and is not certified in any field. He teaches survival skills. He testified the Student is "super smart". The curriculum is in the field and includes such topics as geology and astrology which the instructor teaches. The Student improved somewhat and eventually hit a plateau and was transferred to a somewhat less restrictive setting, Oakley, which is a therapeutic program but not a wilderness program. Testimony of Van Cleve.

48. The Student lasted a short time at Oakley and was exited for noncompliance. No further information was available and the Father flew out to get him and within a short time placed him at Eckerd in Florida. These programs were selected in consultation with Dr. Tomanelli who testified that Eckerd is appropriate for the Student. At that time the older brother was out of the home and beginning in college out of state. Testimony of Father.

49. Eckerd is licensed by the Florida Department of Children and Families, and the educational program was accredited by the Pinellas County School Board and by various private accreditation organizations. Some of the staff are certified and some are not. The Student's progress has not been consistent but there has been some improvement in his responses to frustration and anger management. He is doing well academically but then he is of higher intellect than the average participant. He is working on Eckerd's 12th grade curriculum. Patrick Curley, Director of Eckerd Youth Initiative's Camp-E-How-Kee (Camp).

50. The Board scheduled a PPT with the Father on September 13, 2005 and notice of that PPT was sent to 8 Echo Lane, Greenwich, CT 06830, which was an address that only the Mother had lived at, but at a time prior to the Orchard Street address (another address at which only the Mother had lived). B-33; B-44. That was not either parent's address and the notice was returned to Greenwich High School on September 19, 2005. B-33. According to the Board's assistant that was the address provided to her by school personnel on the Board's "IEP Level I" form. B-44, Tedesco Testimony.

51. In its letter dated October 18, 2005, B-37, the Board proposed several PPT dates, including November 7, 2005. However, while the Father had agreed to that November 7th date, he never received notice of that PPT meeting or any procedural safeguards, because the Board had mailed them once again to the wrong address (8 Echo Lane, Greenwich, CT 06830). B-46, Father Testimony,

Tedesco Testimony. The Board used the 8 Echo Lane address because it was the address provided in its "IEP Level I" form. B-46, Tedesco Testimony. According to Mrs. Tedesco, she spoke to the Student's mother on October 18, 2005 and was informed that the Student's mother was "not part of the loop", and all information should be sent to the Father. B-46, Tedesco Testimony. Mrs. Tedesco testified that the results of the November 7, 2005 PPT meeting, including written prior notice, were sent to the individuals and the addresses listed on the "IEP Level I" form. Tedesco Testimony. Consequently, the results of the November 7, 2005 PPT, including written prior notice were sent to the Father at 8 Echo Lane, Greenwich, CT 06830, the address listed on B-46, which was the identical incorrect address used for the notice of the September 13, 2005 PPT that had been returned to the Board. B-33. Therefore, the Father did not receive the results of the November 7, 2005 PPT, until he had met with his counsel to prepare for the hearing and review the Board's exhibits. Father Testimony

52. The Father arrived on time for the 8:30 a.m. November 7th PPT but his counsel was delayed by traffic. The Father told Mr. Dineen this when Mr. Dineen checked in on the Father twice. The counsel appeared approximately one half hour late and the PPT had just begun. It lasted for approximately one half hour once the counsel arrived. No recap was offered to the Father and counsel because nothing substantive had been covered; that nothing substantive was covered was also not told to the Father and counsel, and certainly it would have been move in keeping with the cooperative intent of IDEA to offer such an explanation. The Board members of the PPT did not ask the Father about the Student's program or progress at his three placements since leaving the Board's high school, nor did the Board members at that PPT solicit the Father's input or concerns for the IEP. The Father was not presented with the goals and objectives during the November 7, 2005 PPT for review and that he had not provided any input into developing them or the Student's Transition Plan. The Father did request placement at the Eckerd Youth Initiative at the November 7th PPT. The Board was not willing to consider the Student's out of district placement as they believed it violated LRE and that their self contained CSP was appropriate. B-38, Testimony of Anorga, Testimony of Dineen, Testimony of Father.

53. The record of the November 7, 2005 PPT listed Dr. Tomanelli's September 29, 2005 letter as the only evaluation, test, or report that the PPT had "used as the basis for its decision." B-40(4). Ms. Anorga was unable to adequately explain the inconsistency between the Board's recommendation for the CSP program at the high school and Dr. Tomanelli's professional recommendation for Eckerd. B-34. Anorga testimony. In the section dealing with Transition Service Needs the Student's Interests and Preferences are described thusly: "[The Student loves the outdoor and the environment. He especially likes to ski. If [the Student] can be involved in activities both educational and recreational within an enviornmental [sic] context he would be happy." B-40, p. 13.

CONCLUSIONS OF LAW:

1. There is no dispute that the Student is entitled to special education and related services as a student identified with as other health impaired and thereby entitled to receive a free and appropriate public education ("FAPE") pursuant to 20 U.S.C. §1400 et. seq., the Individuals with Disabilities Education Act ("IDEA", also "the Act"), 34 C.F.R Section 300.7(a) and Section 10-76a-1(d) of the Regulations of Connecticut State Agencies (RCSA).

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;
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> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
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> (D) are provided in conformity with the individualized education program required under Sec. 614(d)." 20 U.S.C. Section 1401(8).

3. The Board has the burden of persuasion in this matter. This is not altered in by *Schaffer v. Weast*, 546 U.S. ____, 126 S. Ct. 528 (U.S. 2005). *Schaffer* was addressing a situation from Maryland, a state whose statutory and regulatory scheme is silent on the allocation of burden of persuasion in special education cases. The Court recognized that, similarly, IDEA is silent on the allocation of the burden of persuasion. "Congress has never explicitly stated…which party should bear the burden of proof at IDEA hearings." *Id.* Under the circumstance where a state is silent on the allocation of the burden, the Court found that the burden of persuasion falls upon the party seeking the relief. However, the Court affirmatively elected not to decide the issue of the burden of persuasion when states have their own laws or regulations which assign the burden to the school district. "Because no such law or regulation exists in Maryland, we need not decide this issue today." Id. at III. 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. Therefore, the burden of proof remains on the Board.

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. In emphasizing compliance with procedural requirements, Congress acted on its 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 the IEP. *Rowley*, 458 U.S. at 206.

6. Central among the procedural safeguards is the process of developing an individualized education program for each child. 20 U.S.C. §1401(a)(18)(D); *Rowley,* 458 U.S. at 181-182. The IEP sets forth the goals and objectives which provide a mechanism to determine whether the placement and services are enabling the child to make educational progress. 20 U.S.C. §1401(a)(20); 34 C.F.R. App. C to Part 300, question 37 (1991).

7. The IEP is so critical to the IDEA that it has been termed "the key operative feature of the federal Act." *David D.v. Dartmouth School Comm.,* 775 F.2d 411, 423 (1st Cir. 1985), cert. denied, 475 U.S. 1140, 106 S.Ct. 1790 (1986).

8. The IDEA obligates the local education agency to develop an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207.

9. The purpose of the IDEA was to "open the door of public education to [disabled] children on appropriate terms [, not to] guarantee any particular level of education once inside." *Board of Educ. v. Rowley*, 458 U.S. 192. "If personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free, appropriate public education" as defined by the Act." Id. at 3041 The law does not require that a school district provide an educational program to maximize a student's educational potential. Id. at 3046. Rather, the individualized educational program should be "reasonably calculated to enable the child to receive educational benefits[.]" Id. at 3051. The Rowley Court interpreted IDEA as requiring a "basic floor of opportunity," so that the goal of IDEA is not to maximize a special education child's potential, but rather to provide access to public education for such children. *K.P. v. Juzwic*, 891 F. Supp 703, 718 (D. Conn. 1995), citing, *Rowley,* supra, at 200-201. 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.)*; 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").

11. While Boards do not have the responsibility to provide the best education that money can buy, the benefit to be conferred under the IDEA requires more than a trivial educational benefit. *Polk v. Central Susquehanna*, 853 F.2d 171,180 (3d. Cir. 1988).

12. In *Hall v. Vance County Board of Education*, the Fourth Circuit Court agreed that "*Rowley* implicitly recognized that Congress did not intend a school system to be able to discharge its duty by providing a program that produces some minimal academic achievement, no matter how trivial." 774 F.2d 629, 630 (4th Cir. 1985).

13. Addressing the *first* prong of the *Rowley* inquiry, there are numerous significant procedural violations in this case. Compliance with the IDEA is the responsibility of the Board, not the Parents. *Unified Sch. Dist. v. State Dept. of Ed.,* 64 Conn. App. 273, 285, 35 IDELR 30 (2001).

14. In developing the Student's IEP, this Board was required to complete its initial evaluation of the Student and determine his eligibility for special education within forty-five (45) school days and they did not. RSCA §10-76d-13. The Board was required to provide Notice of the PPT to the Parent and they did not on more than one occasion. RCSA §10-76d-13(1),(5), 34 CFR§300.345(a),(b). The Board was required to consider the concerns and input of the Parent regarding the education of the Student and they did not. 34 CFR §300.346 (a)(i). The Board was required to develop an IEP containing annual goals and short term objectives during the PPT with the Parent's input and they failed to do so. 34 CFR §300.347 (a)(2). The Board was required to list a statement or dates that the Board will report on the Student's progress on IEP goals and objectives and they did not. 34 CFR §300.347 (a)(7)(ii). The Board was required to develop a transition plan for the Student and they did not develop an appropriate one. 34 CFR §§300.29, 300.347 (b); and the Board was required to provide the Parent with a copy of the IEP within five (5) days following the date of the PPT meeting and they did not on a consistent basis. RCSA §10-76d-13(a)(6). The Board did not comply with the procedures set out in state and federal law to safeguard the rights of disabled students, all of which is discussed in more detail below.

15. The Father had requested an independent evaluation and this request was ignored by the Board. A parent has the right to an independent evaluation at public expense if they disagree with an evaluation obtained by the public agency and if they request such independent evaluation. 34 C.F.R. §300.502(b)(1)-(2).

16. The Student's mother had signed a consent form allowing the Board to commence its initial evaluation on January 23, 2004. B-9. The Board convened the April 13, 2004 PPT, B-16, more than eighty (80) days after the January 23, 2004 PPT to review its initial evaluation. B-12. The concerns of the Parent were not recorded in the IEPs developed at the September 24, 2004, December 13, 2004, March 14, 2005 and November 7, 2005 PPT meetings. The Father attended the September 24, 2004 PPT, and presented various concerns over his son's academic, social and behavioral issues, and his concerns were not limited to only the Student's participation on the Greenwich High School fencing team as reflected in B-19. The Father did not receive any notice of the December 13, 2004 and

March 14, 2005 PPT meetings because the Board had failed to utilize his correct mailing address, and was prevented from presenting his concerns. Even in the their post-hearing brief the Board continues to minimize the significance of these procedural violations stating that the time spent at the due process hearing on the address is a "non-issue" and a "distraction for the real issues of the matter" because the Father missed "only one" PPT held at the school. First of all, in the Student's entire school career the Board held only six PPTs and only four of them were at the high school, which is where the address problem occurred. Out of those four PPTs, the Father failed to attend two, not one as reported in the Board's brief. He did not get notice, and therefore did not attend, the December 13, 2004 or the March 14, 2005 PPTs. So the proper conclusion is not that the Father missed "only one" of the PPTs due to the Board's failure to properly provide notice, which is inaccurate in both fact and tone, but rather that the Father missed half of the high school PPTs for reason of the Board's failure to properly provide notice.

17. The Father never received the results of any of these PPT meetings because according to Mrs. Tedesco, the results of the PPT meeting, including Written Prior Notice, were sent to the address listed on the Board's IEP Level I form. B-43. B-48. Those addresses were outdated and were not the Father's mailing address. Consequently, in the absence of notice of PPT meetings as well as written prior notice, the Parent was deprived of the opportunity to present his concerns and have meaningful input into the development of the IEPs at those PPTs. IDEA anticipates a cooperative process between parents and schools and central to this collaboration is the IEP process. The IDEA expects strong parent input at the PPT meeting. *Schaffer v. Weast,* 546 U.S. ____, 126 S. Ct. 528 (U.S. 2005). That collaboration did not occur here.

18. The Father did not have any meaningful input into the development of the Goals and objectives for the November 7, 2005 IEP, due to the Board's failure to present any draft goals and objectives for discussion at that PPT, as well as the Board's decision not to write goals and objectives with the Parent's input, or to write goals and objectives <u>after</u> that meeting. The IDEA expects strong parent input at the PPT meeting. *Schaffer v. Weast,* 546 U.S. ____, 126 S. Ct. 528 (U.S. 2005), *Warren . v. Cumberland County Sch. Dist.,* 190 F. 3d 80, 86 /(3d. Cir. 1993). Clearly, this did not occur.

19. The September 24, 2004 IEP did not contain any statement or dates in order to report progress to the Parent for the goals and objectives in that IEP. B-24. Similarly, the November 7, 2005 IEP's goals and objectives, B-40, did not contain any statement or dates on the goals and objectives to report progress to the Parent for those goals and objectives. The provisions of 34 CFR §300.347(a)(7)(ii) requires such information in order for the Parent to be regularly informed of the Student's progress toward his annual goals. Taken as a whole, the testimony and documentation provided by the Board on the goals and objectives is not at all credible and is not given any weight. The documentation, as described in the Findings of Fact, is inconsistent with itself (for example, different versions showing up, some not until days into the hearing), is not completed properly (for example, a goal with no objectives) and is not at all consistent with the Student's report card grades.

20. The transition plan in the 2004-05 and 2005-06 IEPs does not contain any statement establishing a coordinated set of activities, that were outcome oriented, that were based upon the Student's interests and preferences. 34 CFR §§300.295, 300.347(b). In fact, the September 24, 2004 IEP did not contain any transition objectives. B-19(9). The November 7, 2005 IEP does not contain a coordinated set of outcome oriented activities that will lead to further education, independent living and/or employment. 20 U.S.C. §1401(d)(1) (rev. 2004), 34 CFR§300.29; 34 CFR §300.347(b).

21. State regulations require the Board to provide the Parent with a copy of the Student's IEP within five days (5) following the PPT. RCSA §10-76d-13. The Board sent a copy of the PPT meeting results to the address listed on the Board's IEP Level I form. Tedesco Testimony, supra. According to B-43, B-46, and B-48, Notice of the PPT for the December 13, 2004, March 14, 2005 and November 7, 2005 PPT meetings were sent to either 8 Echo Lane, Greenwich, CT or 300 Orchard Street, Greenwich, CT and not to 500 Group Inc., 700 Canal Street, Stamford, CT, the Father's long-standing mailing address. Consequently, the Parent was not provided with a copy of the IEP within five (5) days, RCSA §10-76d-13, or with Notice of those PPT meetings, a copy of his Procedural Safeguards, and/or a copy of the IEP developed at those PPT meetings, including Written Prior Notice, as required by the IDEA. 34 CFR §§300.503(a), 300.500-300.529, 300.345(a)(1).

22.The obligation to provide an IEP "generates no additional requirement that the services so provided be sufficient to maximize each child's potential," Rowley, 458 U.S. at 198, 102 S. Ct. at 3046-47, for "[a]ll the school system must provide is an IEP which is 'reasonably calculated' to provide an 'appropriate education,'" Rome School Comm. v. Mrs. B., 247 F.3d 29, 33 (1st Cir.2001), because while the "IDEA requires states to provide a disabled child with meaningful access to an education, . . . it cannot guarantee totally successful results." Walczak, 142 F.3d at 133 (citing Rowley, 458 U.S. at 192, 102 S. Ct. at 3043-44). However, an IEP must provide an opportunity for more than trivial advancement in order to satisfy the IDEA's FAPE requirements. *Mrs. B. v. Milford Board of Education* 103 F.3d 1114, 1121 (2d Cir. 1997). In this case, the evidence establishes that the IEPs provided and offered to this Student did not provide such an opportunity. This Student was at no time provided with an appropriate IEP and what he was offered came years later than it should have.

23. The September 24, 2004 IEP was not appropriate as evidenced by the Student's decline in grades between the first and second marking periods, as well as the increase in disciplinary referrals and incidents at that time. While the Board appropriately identified concerns about the Student's academic, behavioral, and emotional status, including depression and difficulty in focusing, the Board tragically did not revise the IEP or recommend any further evaluations or testing at the December 13, 2004 PPT. Further, while the Board's initial evaluation noted that the Student was showing at-risk features of anxiety and depression and required assistance that addresses his ADHD, coping skills, behavior and emotional symptoms, the Board did not address those concerns in its 2004-05 IEP or revise the Student's IEP goals, objectives, and related services, other than add four (4) additional periods of resource room support. When the Board had information

after the December 13, 2004 PPT that the Student's grades had declined further during the second marking period, as well as an increase in disciplinary referrals, it did nothing to change the Student's IEP goals and objectives. Instead, the Board scheduled an informal PST meeting on February 17, 2005, later rescheduled to March 4, 2005, to continue what can fairly be described as the Board's persistent habit from elementary school of convening in one form or another to discuss this Student's difficulties in school without offering appropriate interventions. By March 4, 2005 the difficulties consisted of failing grades, lack of effort in class, impulsivity, anger and other concerns, however, the Board still did not recommend any further assessments or evaluations. Instead, the PST concluded that placement at the CSP would be recommended. The fact that this Student was steadily learning and consistently compliant in resource room was testified to by Board witnesses and disputed by no one. And yet the Board could not see their way to offer any more than ten units of resource room in an eight day cycle, jumping from that point to a self-contained program, CSP.

24. The Board has not presented any evidence that the CSP would have provided the Student FAPE. There was no information provided that the CSP would meet the Student's needs, especially since that the CSP staff never observed or evaluated the Student. Instead, the Board relied upon its initial evaluation that was a year old when the Student left the high school and did not address the changes in the Student's emotional and behavioral issues since March, 2004. Further, in November 2005 the Board appeared to disregard Dr. Tomanelli's opinion that CSP was not appropriate for the Student and his recommendation that the Eckerd placement was appropriate for special educational reasons. Neither Headmistress Anorga or resource room teacher Dineen (or any other Board witness) could offer any explanation as to why the Student wasn't offered more than ten units of resource room assistance, other than to state that more than ten usually weren't ever provided and ten seemed to be a good amount to offer.

25. The Board was required to maintain a continuum of alternative educational placement for the Student, 34 CFR 300. 551(a); including alternate schools. In this situation, after ignoring their own staff recommendations for a PPT *for years,* the Board finally convened a PPT and finally identified the Student and they found an intervention that worked for this Student (resource room) but they gave him too little too late. After years of failing to identify and properly service the Student, it is not surprising that the Student demonstrated school avoidance and other inappropriate behaviors. He is bright and had endured years of not doing well in school (except for resource room) and he was also going through adolescence. These factors predictably left him unmotivated and with terrible study habits. Then, rather than quickly and repeatedly increasing what was proven to work for this Student (resource room), the Board made a leap from resource room assistance to a self-contained program without any basis to support the claim that this was appropriate for this student; it appeared that the Board offered what was available, rather than what would meet the Student's needs.

26. In placing the Student at the Aspen Achievement Academy in Utah, the Oakley School and the Eckerd Youth Initiative in Florida the Parent made unilateral placements. "Parents who unilaterally change their child's educational placement without…the

consent of school officials, do so at their own financial risk." *Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985); *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993). "[W]hether the parents of a disabled child are entitled to reimbursement for the costs of a private school turns on two distinct questions: first, whether the challenged IEP was adequate to provide the child with a free appropriate public education; and second, whether the private educational services obtained by the parents were appropriate to the child's needs. …Only if a court determines that a challenged IEP was inadequate should it proceed to the second question." *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed.*, 226 F.3d 60, 66 (2d Cir. 2000).

27. The evidence is overwhelming that Board failed to provide a free appropriate public education for this Student for the 2004-2005 and 2005-2006 school years.

28. In the case of a unilateral placement, in order to secure public funding parents must prove 1) school district placement was not appropriate and 2) unilateral placement is appropriate. *Burlington v. Department of Education,* 736 F.2d 773 (1ST Cir. 1984).

29. Having concluded that the Board failed to provide FAPE, the second part of the analysis shifts the burden to the parents to prove that the placement they selected is appropriate. *Sch. Comm. of Town of Burlington v. Dept. of Educ. Mass.,* 471 U.S. 359, 370 (1985); *Tatro v. State of Texas,* 703 F.2d 823 (5th Cir. 1983), aff'd. 468 U.S. 883 (1984); *S. ex rel. S. S. v. Board of Educ. of the City School Dist. Of the City of Yonkers,* 231 F. 3d 96, 104 (2d Cir. 2000).

30. When it is determined that the Board's program is inappropriate, the parent is entitled to placement at the Board's expense if the parent's private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). In selecting a unilateral placement, parents are not held to the same standards as are school systems. Since *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993). It is well settled that the unilateral placement does not have to meet the standards of a least restrictive environment (LRE), nor even does the unilateral placement have to include certified instructors in special education, 34 CFR §300.403(c). *M.S. ex rel S.S. v. Board of Education of the City of Yonkers*, 33 IDELR 183 (2nd Cir. 2000), citing *Warren G. v. Cumberland County School District,* 190 F. 3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect).

31. The program choices made by the Father were not perfect. There should be serious concern that this bright boy is significantly brighter and more academically capable than the other students in the private placements that the Father has selected. The instructor from Aspen described the student as 'super smart" and the witness from Eckerd testified that the Student (now in tenth grade) was working on their twelfth grade curriculum. It is certain that the Student is smart enough to be aware of the intellectual disparity between the other students and himself. Both private school witnesses described the Student as being very resistant in one form or the other to their interventions. This is understandable given that it is likely that from the Student's perspective, he and his older brother did not

get along and fought, apparently the Student was more often the weaker part of the matches (the DCF referral), yet the older brother, whose behaviors were described by the Father as being worse and more extreme, was maintained at home and the Student was sent away, something he strongly opposed (Aspen and Oakley); and sent away again even after the older brother moved away to college (Eckerd). More than in most cases there are significant unanswered questions here. However, as imperfect as these programs turned out to be, the Father was following the advice of a placement consultant and Dr. Tomanelli and the programs, before placement, had an element of the unknown to them in that it was not and could not be known how the Student would progress in the placements until they were tried. On the other side, the Father did have the certain knowledge that the Board's IEPs had failed and they had failed for years. Hindsight being twenty-twenty there are probably much more appropriate private placements for this student. However, given the standard for examining a parent's choice, this Father has satisfied his burden of demonstrating appropriateness.

32. Due Process Hearing Officers have the authority to provide compensatory education as an equitable remedy for a denial of FAPE. *Inquiry of Kohn* 17 EHLR 522 (OSEP)(2/13/91)(citing with approval *Lester H. v. Gilhool* 916 F. 2d 865 (3d Cir. 1990), *Burr v. Ambach* 863 F. 2d 1071 (2d Cir. 1988)). "Compensatory education effectuates this purpose by providing FAPE which the child was entitled to receive." *Id.* Compensatory education is a proper remedy to enforce IDEA rights such as a board's failure to comply with the IDEA's procedures. *Mrs. C. v. Wheaton,* 916 F. 2d 69, 75, 16 IDELR 126 (2d Cir. 1990). *Inquiry of Kohn*, 17 EHLR 522 (OSEP 1990).

33. The record in this matter is replete with the Board's gross procedural violations. This Board had delayed for years identifying this boy, had ignored the recommendations of their own staff to PPT this child years earlier, had ignored their own PST's recommendation for evaluation, had ignored the Father's request for an independent evaluation, at no time took any effective responsibility for their notice failures, did not know this student's special education status (identified), did not appear concerned about his needs (for example, did and would not provide more resource room assistance in a timely manner, did not provide enough computers in the resource room), did not propose any goals and objectives that would address the Student's anxiety, depression, coping skills and behavioral or emotional symptoms that were reported in the Board's own initial evaluation and had been reported on this child in one form or another by the Board's own staff since fourth grade and generally gave no indication that they were individualizing a program for this student's needs, all in violation of state and federal regulation. Given the Board would not even follow their own recommendations there is absolutely no reason to believe parental input was or would be seriously considered, in further violation of IDEA. The Board should have identified the Student years earlier and should have presented a program that kept the Student in the mainstream with a steep increase in resource room assistance as, and if, needed.

FINAL DECISION AND ORDER

1. The Board failed to provide the Student with a free appropriate education for the 2004-2005 and 2005-2006 school years.

2. The Board shall reimburse the Father for the Aspen, Oakley and Eckerd programs from when the Student entered them through the 2005-2006 school year.

3. The Board shall reimburse the Father for the costs of tutoring and therapy for the Student during the 2004-2005 and 2005-2006 school years.

COMMENT ON THE CONDUCT OF THE PROCEEDINGS:

Pursuant to Conn. General Statutes 10-76h(d)(1), the Hearing Officer hereby comments on the conduct of the proceedings. Both parties' counsel conducted themselves in a professional and efficient manner in this case. They came to hearing prepared, cooperated with each other regarding the production of witnesses and did not unduly prolong the proceedings. The Student's attorney presented a case that was methodical and required painstaking attention to detail because of the many complicated issues of conflicting documentation and notice. He on two occasions conducted devastating cross examinations of Board witnesses which were ultimately necessary to establishing the truth of what had transpired; without such skilled lawyering this would likely not have occurred.