

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Fairfield Board of Education

Appearing on behalf of the Parents: Attorney Alyce Alfano, Klebanoff & Alfano, P.C.,
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Appearing on behalf of the Board: Attorney Michelle Laubin, Berchem, Moses &
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Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board has offered an appropriate program for the Student for the 2006-2007 school year.
2. If not, whether the Student shall be placed at the Perkins School for the Blind for the 2006-2007 school year in order to receive an appropriate program to meet the Student's needs.

SUMMARY:

The 15 year old visually impaired Student is currently enrolled at the Perkins School for the Blind. While the Board offered the Student a Program at one of the Board high schools, with consultative services from a teacher of the visually impaired, and other services, accommodations and modifications, the Parents sought continuation of the Student's program at Perkins for the 2006-2007 school year. The Parents requested this hearing to challenge the appropriateness of the program offered by the Board, and to continue the Student's placement at Perkins.

PROCEDURAL HISTORY:

The Board received this hearing request filed on behalf of the Parents on May 26, 2006. [Exhibit H.O.-1]

This hearing proceeded for 14 days, from July through December 2006. The Parents' attorney and the Board's attorney submitted requests for extensions of the mailing date of the decision based on assertions that additional hearing dates were required to present their case, which were granted. The mailing date was further extended by request of the

parties so that the parties could present closing argument on the last day of the hearing, in lieu of filing briefs.

The Parents' witnesses were the Mother; Denise Fitzgerald, the Student's case manager at Perkins School for the Blind; and Cynthia Essex, program supervisor of the secondary program at Perkins School for the Blind.

The Board's witnesses were Andrea Leonardi, Board director of special education; Karen Lavelle, special education teacher for the Board middle school; Heather Edwards, Board-contracted occupational therapist; William Webb, education consultant/mobility for BESB; Ann Leffert, Board elementary special education coordinator and former inclusive education facilitator; Neil Washington, Board contracted physical therapist; Jennifer Smith, learning center teacher at the Board high school; Barbara Giaquinto, Board secondary special education coordinator; and Dana Uhrynowski, Board teacher of the visually impaired [TVI].

In addition to the testimony of all witnesses, a substantial number of exhibits were submitted by the parties, which have been thoroughly reviewed and carefully considered in rendering this decision.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

FINDINGS OF FACT:

1. The Student is 15 years old, and is currently attending Perkins School for the Blind in Watertown, Massachusetts.
2. The Student has had cerebral visual impairment [a/k/a cortical visual impairment, "CVI"] since shortly after birth. This CVI results in fluctuating vision, due to damage in the visual processing. The Student also has mild cerebral palsy and some learning disabilities. His mobility is compromised by CVI, due to the fluctuating vision, other vision issues, and a lack of depth perception. The Student is distractible, and when distracted, his vision essentially shuts down. [Testimony Mother]
3. The Student has been attending the Board schools since preschool, and has been identified as eligible for special education since the time of his referral from the Birth to Three System.
4. The Student presents with a complex set of strengths and needs, visually and in terms of learning. He has issues with language and memory. He has disabilities in motor skills, particularly with visual motor skills, and he has a cognitive processing disorder. His progress has been "consistently inconsistent" according

- to the Board director, showing mastery of the skill on one day, and variability in performance on another day. [Testimony Ms. Leonardi]
5. Due to the Student's diagnosed CVI, his vision is impacted when he is distracted, and with extended distractibility, his vision would be impacted negatively. [Testimony Ms. Smith] The staff who worked with the Student at Fairfield agreed that it is best to teach the Student in a quiet setting, as he is highly distractible. [Testimony Ms. Edwards]
 6. As the Student moved into the middle school in sixth grade, a more complex environment, he began to have more difficulty in navigating through the school, and difficulty in other areas. [Testimony Mother]
 7. In sixth grade, the school based members of the team and the Parents met for a COACH [Choosing Outcomes and Accommodations for Children] session. COACH is a planning meeting and document which is used as a long range planning tool to go through all the domains in the Student's life, and determine educational priorities. [Testimony Ms. Lavelle, Ms. Leffert; Exhibit B-61A]
 8. The eight priorities identified by the participants in the COACH session were that the Student: (1) sustains communication with others; (2) advocates for self; (3) works on self help skills [utensils, dressing/undressing, manage personal belongings]; (4) functions independently in community [transportation, phone, money, purchases, safety]; (5) recognizes/avoids/solves potentially dangerous situations; (6) engages in leisure activities with others – after school activities; (7) directs/sustains attention to activity; (8) works at tasks independently. [Exhibit B-61A]
 9. At the end of sixth grade, the Student continued to read somewhere in the second to third grade level. [Testimony Ms. Lavelle] His present level of academic performance was described as “primary” in math and reading. It was also noted that the Student had communication deficits in the volume of his voice, conversation skills and self advocacy. The Student had difficulties with his activities for daily living, including his visual perception and fine motor skills. The Student's Individualized Educational Program [IEP] document listed present levels of performance. In the present levels of performance listing, it was explained that the Student's disability affects his vision, cognitive ability, motor skills and distractibility. According to the IEP, the disability requires that the Student have an alternative curriculum as well as supports and aids. It was planned that he would spend for 8.25 hours per week with nondisabled peers. [Exhibit B-69]
 10. The Student's progress in sixth grade was inconsistent and limited. On goal one, to improve basic conversation skills, the Student's progress was noted as “emerging” for maintaining a conversation, and satisfactory minus [S-] for modulation of volume. He mastered his ability to attend and orient to the speaker.

All progress on goal two, to improve use of daily language in areas of telephone use and ordering food at a restaurant, was noted as “emerging,” not satisfactory progress (likely to achieve goal) nor mastery. Goal three was also noted as satisfactory minus and emerging for skills in asking directions to a location and remembering and following those directions. Goal three was for the Student to improve critical thinking skills. The objectives on goal three addressing ability to ask for help or differentiate safe from dangerous situations, and weigh other situations, were given a satisfactory minus. On two of the objectives in goal three, however, that level of progress was only met with cues and choices, which were not part of the originally drafted goals. Limited progress on goal five [S- or “emerging], with objectives as to social awareness, was only achieved with prompts, cues and choices. Two objectives in self help skills in goal six were progressing satisfactorily, but the second objective, to wipe face, was not introduced. On goal seven, also a self help goal, the Student was unable to open, put on, lock and remove his lock from his locker independently. Goal eight was apparently erroneously marked as satisfactory progress, since the underlying three objectives of demonstrating the ability to use a knife and to open and close a variety of clothing fasteners were either marked with O or “?”. On goals nine and ten, the student was making satisfactory progress on working towards independence in negotiating the school environment, as well as in his work on his gross motor skills. [Exhibit B-73]

11. Continuing further in the goals of the Student’s IEP, the Student was marked as making “satisfactory” progress in his adaptive physical education goal, but the only objective in the goal of performing modified push-ups, the Student was marked as inconsistent. The Student further made unsatisfactory progress on goal 12 to demonstrating increased body awareness so that he can successfully participate in the physical education curriculum; and “inconsistent” in goal 13, involving demonstrating increased gross motor skills in adaptive physical education. While the Student mastered two math objectives of reading the time and reading numbers to 100, in goal 14, his further objectives on telling time, using money and using a calculator were marked as satisfactory progress. On goals 15, 16 and 17, to improve reading skills in decoding and comprehension and writing, the Student was making satisfactory progress. While the Student mastered three objectives in goal 18 regarding completion of the a.m. and p.m. routine, traveling the halls with diminished prompting, and entering and exiting the building, the Student only made limited progress in asking for help, and was only marked as “b”, beginning, in his ability to express his feelings and concerns. The Student was marked as making satisfactory progress in goal 18 on the objective for completion of the lunch routine at the end of sixth grade. [Exhibit B-73]
12. Throughout his education at the Board schools, the Student’s program has been overseen and directed by the teacher of the visually impaired. This continued in middle school.

13. The middle school special education teacher relied upon the Board teacher of the visually impaired [TVI] as the “expert,” the “one who you would turn to” to understand the Student’s visual impairment. [Testimony Ms. Lavelle] This was reiterated by Ms. Leffert, who indicated that she relies on the Board TVI, who has knowledge of CVI and the Student. [Testimony Ms. Leffert] The Board special education coordinator testified that the TVI is crucial for the Student’s program. [Testimony Ms. Giaquinto] The Board TVI is the only certified teacher of the visually impaired that has serviced the Student at the Board schools, and is the only TVI on the proposed program for the 2006-2007 school year. [Testimony Ms. Smith]
14. The Board TVI has been employed as TVI for the Board schools for 24 years, and has been a TVI for 32 years. The Board TVI is employed as a fulltime teacher of the visually impaired. Her responsibilities as a TVI are to service the visually impaired students in the school system, including acting as a liaison with the school, parents and BESB (the state Board of Education Services for the Blind which provides services to children and adults who are blind/visually impaired). Also, on a daily basis, the TVI is responsible for assisting the team members who are working with the students to plan for their education and provide services. Depending on the students’ needs, she provides direct services which would include assisting the students to use modifications, as well as providing adaptations and services. In addition, when appropriate for the needs of the students, she teaches the visually impaired students Braille and how to use technology. The TVI has the responsibility for adapting the curriculum to serve students’ visual needs. The TVI currently has 15 students on her caseload. [Testimony Ms. Uhrynowski] While the TVI had a substantial number of years of experience working as a TVI, the TVI’s testimony was concerning, unpersuasive, and not credible.
15. One instance, in which the Board TVI lost her credibility, was in her testimony regarding an exhibit regarding a PowerPoint presentation which was authored by the Mother. [Exhibits B-75B, P-18] During Ms. Uhrynowski's testimony, it was eventually revealed that the document identified as Exhibit B-75B, in the Board’s exhibits, was not the PowerPoint presented to the Board staff by the Mother. Rather, this was a new draft of the PowerPoint that the TVI revised and printed out to keep it in her own records. When the TVI saw that her draft was the one that was presented in the hearing, she did not indicate that this was a revision, but in her cautiously worded responses called it a “version” of the Parent’s PowerPoint presentation. She never printed out the version that the Mother presented, but retained a copy of her revised version in her files. [Testimony Ms. Uhrynowski] Her mincing of words and testimony on this issue was gravely concerning, as it became clear that her other testimony lacked frankness and credibility. This was of great import in this case, when the unpersuasive witness was the critical member of the Student’s team, termed a “crucial” member of the team by the Board special education coordinator.

16. The TVI testimony further was extremely concerning, in that she testified, contrary to all documentation and testimony about the Student, that the Student is sometimes stubborn, not experiencing a visual impairment. The TVI asserted that the Student sees things, but chooses not to complete tasks. The TVI testified that in her opinion there are times when the Student's vision issues are not present, and the Student claims his vision is compromised, when it is not. The TVI asserts that this is volitional, stubborn. While the TVI acknowledged that the Student's vision vacillates, and that distractions can interfere with the manner in which the Student's brain processes, the testimony was of grave concern, coming from the one person that every Board staff indicated they relied upon. She even went further claiming that the Student does not have a true visual impairment because the structure of his eyes is alright; the damage has been in the brain. While it is acknowledged in all evaluations, and the TVI concedes, that it is neurological damage that has caused the Student's inability to perceive visually, the TVI's downplaying of his genuine visual impairment was outrageous and inappropriate. [Testimony Ms. Uhrynowski] The reliance on this inappropriate TVI, a crucial part of the Student's program, is evidence that the Student's program at the Board's school in prior years, and reliance on such erroneous expertise renders the program for the 2006-2007 school year inappropriate.
17. At the beginning of the seventh grade year, the Mother gave the PowerPoint presentation to the Board staff to help to explain what CVI was and how to understand the Student's needs. [Testimony Mother, Exhibit P-18] This was evidence of the Parents' attempts to work cooperatively with the Board to provide a positive educational experience for the Student. The Parent also testified as to other times when she attempted to cooperatively problem-solve the Student's issues in the dealing with the lunch line routine, and in finding his stored items in the art room. The Parents are to be commended for directing these efforts and trying to resolve these issues in the school.
18. During seventh grade, the Student was experiencing a tough year at school. The Mother testified that the Student would return home from school and report that he hated school, and would say he was dumb. [Testimony Mother]
19. On occasion, the Student got lost in the hallways during his seventh grade year. While the Student was provided a paraprofessional in school, he was not provided one for travel within the school environment although he had difficulty in navigating the hallways. [Testimony Ms. Uhrynowski]
20. The BESB consultant met with the Board physical therapist about two or three times during the seventh grade year. While the PT was not certified in orientation and mobility [O & M], this PT was the primary staff providing the Student with O & M training at the Board schools. When the Student began using a long cane for assistance in mobility, the PT was not notified by the BESB consultant. Rather, when the PT "noticed that [the Student] was using a cane," he contacted Mr. Webb to discuss how to train the Student on the use of the cane. The PT had no

- experience or training in how to assist the visually impaired in using the cane, except for a cursory training from the BESB O & M consultant. The Student's use of the cane at school in seventh grade was inconsistent and unsuccessful. [Testimony Mr. Washington]¹
21. The PT had little experience in dealing with students with CVI, and was not provided sufficient consultation from the BESB consultant. He also was not provided sufficient consultation with the TVI, who merely consulted with the PT about 5 minutes per week about the Student. [Testimony Mr. Washington]
 22. The paraprofessional was supposed to prepare science materials for the Student, according to the TVI, although the paraprofessional was not a special educator, nor a teacher of the visually impaired. In a PPT update from the TVI it was noted that the para was to be trained to prepare enlarged materials, PowerPoints and Clicker 4 activities. [Testimony Ms. Uhrynowski, Exhibit B-80A] It was not appropriate to rely on the paraprofessional to draft these educational materials.
 23. During the 2004-2005 school year, the only two objectives mastered were one that the Student "will open ink pad box, depress stamp into ink and orient stamp to worksheet appropriately with verbal prompts" and that he will "continue to open all packages at lunch time independently." The goals included: (1) improving skills as an auditory reader; (2) maintaining and increasing functional sight words; (3) demonstrating improved writing skills; (4) improving math skills; (5) improving social communication skills; (6) demonstrating improved vocabulary skills; (7) improving independence in mobility in the school environment; (8) improving gross motor skills within the educational setting; (9) and (10) improving fine motor skills and increasing self help skills; (11) learning how to use the internet; (12) demonstrating physical fitness skills and gross motor skills. [Exhibit B-98]
 24. In seventh grade, the Student's triennial evaluation was due, and the Board agreed to have the Perkins School for the Blind conduct the evaluation. [Testimony Mother] The evaluations were completed on May 10 and 11, 2005 by the Perkins School for the Blind. The comprehensive evaluation included a psychoeducational evaluation, an educational evaluation, an orientation and

¹ According to the regulations, orientation and mobility services are to be provided by a qualified individual. The PT does not have sufficient background and experience to meet this requirement. In accordance with 34 CFR sec. 300.34, "Orientation and mobility services-- (i) Means services provided to blind or visually impaired children *by qualified personnel* to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and (ii) Includes teaching children the following, as appropriate:(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street); (B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision; (C) To understand and use remaining vision and distance low vision aids."

- mobility evaluation, a speech and language evaluation, an occupational therapy evaluation and a physical therapy evaluation. [Exhibit B-96]
25. The Board relied on the Perkins School for the Student's evaluation, as Perkins completes comprehensive evaluations of children with visual impairments, according to the Board TVI. [Testimony Ms. Uhrynowski]
 26. The psychoeducational evaluation concluded that the Student has severe multiple impairments, noting that he has a cortical visual impairment, mild cerebral palsy, attention deficits and learning disabilities that include a neurodevelopmental language learning disorder. The evaluator noted that the Student's academic skills and independence are increasingly different from those of his peers, and his future independence and social-emotional adjustment are at risk. The evaluator recommended that the Student requires intensive individual instructional support in small classrooms with language and occupational therapies well integrated into all aspects of an experience based program. The evaluator noted that the instruction must be at the Student's pace, and that a one teacher to four student ratio would allow many interactions to be individualized. The evaluator noted that the typical larger mainstreamed classes will not be appropriate. The evaluator indicated that the Student's primary mode for instruction was auditory. It was further noted that this auditory material must be brief with consistent use of strategies to prepare him, focus his attention, and ensure and monitor his comprehension. It was noted that the Student requires instruction in adaptive skills for independence and that the Student's vision would be important for development of future independence, recommending well organized large print with good contrast. The evaluator recommended that the Student required extended years in school to learn the core curriculum and the expanded core curriculum for blind and visually impaired students. The evaluator cautioned that the Student should be monitored for signs of increased frustration and adjustment concerns and his participation in social and recreation activities with students with comparable needs should be encouraged and supported. Conversational skill development work was recommended to be continued and supportive individual counseling was recommended. [Exhibit B-96]
 27. The educational evaluation involved an assessment on basic skills. In money skills, the Student mastered most of the money skills usually achieved by students in third grade. The Student was administered the listening section of the Brigance to determine the level of the Student's listening skills and identify any significant delays. The listening section of the Brigance indicated that the Student had mastered some of the skills achieved by fifth grade students. The evaluator recommended that the Student should continue to work on money skills, and that his listening skills should continue to develop. [Exhibit B-96]
 28. The orientation and mobility evaluation recommended that the Student continue instruction in the various cane techniques to determine which are beneficial to

- him, and should have instruction in residential neighborhood travel. Orientation and mobility training was recommended on a weekly basis. [Exhibit B-96]
29. The speech and language evaluator concluded that the Student's receptive and expressive language skills remained in the below average range. The Student's social and conversational skills appeared limited for his age. The evaluator recommended that the Student enroll in a small language based classroom with a small student to teacher ratio with a teacher who specializes in teaching the visually impaired population. It was also recommended that the Student continue to receive direct speech and language services focused on supporting his receptive, expressive and social language skills. [Exhibit B-96]
 30. The occupation therapist evaluator noted that the Student struggled quite a bit during occupational therapy testing, demonstrating many splinter skills across the board and many compensatory strategies for the gaps that he is missing. It was recommended that the Student continue with OT, two 30 minute sessions per week. The OT also recommended that the Student would benefit from a small quiet classroom to minimize distraction. The physical therapist evaluator recommended direct physical therapy one time per week, adaptive physical education, extracurricular and free time physical activities, physical education class, and a swimming program. [Exhibit B-96]
 31. The Student attended Perkins School for the Blind as a residential student commencing in the 2005-2006 school year. He attended as a residential student, as there were no similar day programs for the Student in Connecticut. [Testimony Mother]
 32. During the 2005-2006 school year, the staff at Perkins was confused as there was no Planning and Placement Team [PPT] meeting held to plan the Student's Individualized Educational Program [IEP]. The Perkins staff contacted the Board staff and faxed the goals and objectives to discuss with the Board staff. The Board special education coordinator had a telephone conversation where she directed the Perkins staff to "pretend there is no IEP from Fairfield, put it in the drawer and forget about it." [Testimony Ms. Fitzgerald] The Board special education coordinator noted that that phone conference was to come to an agreement on what goals and objectives would be worked on for that year, but that it was not a PPT meeting. [Testimony Ms. Giaquinto]
 33. At Perkins, the Student's socialization with other students greatly improved, and he was involved in extracurricular activities. He returned home every weekend to Fairfield to be with his family. [Testimony Mother] The Board staff acknowledged that the Student was more engaged with his peers and in activities at Perkins than he had been at the Board schools. [Testimony Ms. Leffert]
 34. In January and April 2006, members of the Board staff visited Perkins School. While at the hearing, the Board staff testified that they had concerns with the

- Perkins program at the first and second observations, the report of both observations was not shared with the Parents until much later, in April 2006. [Testimony Ms. Leffert, Exhibit B-111] While the Board staff testified that they felt the Perkins program was outdated and inappropriate, it is found that the Perkins program was appropriate for the Student.
35. During the 2005-2006 school year, the Student made progress at Perkins. The goals and objectives were marked for progress, and included annotated comments by staff who directly worked with the Student. [Testimony Ms. Fitzgerald, Exhibit P-4] The Student mastered many objectives, and there was an annotated description included in the progress reporting regarding the specific manner in which the Student was moving towards mastery of the objectives. [Exhibit P-4]
36. In spring 2006, the PPT convened, and the Parents requested that the Student remain at Perkins for the 2006-2007 school year and that the Board fund this placement. [Testimony Mother] That request was denied. [Exhibit B-116]
37. The Board proposed a program at the Board high school for the 2006-2007 school year. That program included two hours of orientation and mobility training per month, and no direct services from the teacher of the visually impaired [TVI] services. Paraprofessional support was not delineated in the IEP, except to indicate that para support would be provided "as needed." [Testimony Mother, Ms. Leffert; Exhibit B-116] The Board special education coordinator noted that "it would be up to the case manager to schedule out to make sure someone would be with the Student in the mainstream classes, if the team agreed that that was important." [Testimony Ms. Giaquinto]
38. In previous school years at the Board school, the TVI provided direct services to the Student. These direct services were for academic support and to help him to use the assistive technology.² [Testimony Ms. Uhrynowski; Exhibits B-69, B-53] The program for 2005-2006 included a recommendation for 1.5 direct services and 1 hour consultation. [Testimony Ms. Uhrynowski, Exhibit B-93] No direct services from the TVI were recommended for the 2006-2007 school year. While in testimony the TVI indicated that she recommended 3 hours of consult for her services for the 2006-2007 school year, this level of services was not expressly identified in the accommodations/modifications in the Student's IEP. [Exhibit B-116] Nothing in the testimony and exhibits demonstrate why such a critical direct service was omitted for the 2006-2007 school year.
39. No paraprofessional service amount was listed on IEP, and no direct TVI services were to be provided to the Student for the 2006-2007 school year. Based on the IEP, the Student would be in the mainstream classes without any one on one support. [Testimony Ms. Uhrynowski] Moreover, paraprofessional support was not included in the IEP, except for a mention in the PPT minutes that a para

² Braille instruction was attempted at the Parents' request, which was also provided as a direct service to the Student. [Testimony Ms. Uhrynowski]

- would be provided for assistance in extracurricular activities on an as needed basis. [Testimony Ms. Uhrynowski, Exhibit B-116] According to the BESB consultant, the high school and the middle school are difficult schools for the Student to navigate, and the consultant testified that the Student would benefit from a one on one paraprofessional in those settings. [Testimony Mr. Webb] Once again, a crucial component of the Student's program was omitted without an appropriate explanation, and without an appropriate basis.
40. At the Board high school, the Student's program was to include reading, writing, and math in the learning center; and science, social studies and electives in a mainstream class. [Testimony Ms. Smith]
 41. While the Board staff had testified that the Board needed a Functional Behavioral Assessment [FBA] to be conducted in 2006-2007 to deal with the Student's distractibility, that is nonsensical. The Student's distractibility has physiological reasons, and emanates from his disability; it is not volitional. [Testimony Ms. Giaquinto]
 42. The OT who worked with the Student in the Board school indicated that she did not believe that the daily living skills are educational, as they don't affect his learning in school. [Testimony Ms. Edwards] These skills are appropriate for the Student to learn, and should be part of his educational program.
 43. The Student requires orientation and mobility training, which provides strategies and techniques for the visually impaired and blind to compensate for vision loss to travel safely and independently as they can. Orientation is keeping track of where you are in space; mobility is the actual movement through the space. [Testimony Mr. Webb]
 44. At the Board schools the Student received orientation and mobility services from Mr. Webb of BESB. The O & M consultant serves 175 to 225 people per year. At the time that the Student was at the Board schools, Mr. Webb was last working on readiness for residential travel in a very introductory manner.³ The O & M consultant recommended that teachers not approach the Student while he is traveling in the hallways, as he is highly distractible. [Testimony Mr. Webb] Such direction is reasonable, although it hinders the Student's ability to have peer and teacher social connections in the hallways.⁴

³ Residential travel is traveling in an area that is made up of homes, not businesses, and the O & M consultant works on using landmarks in the residential areas to teach the Student.

⁴ When the Board staff made their observations at the Perkins School, they were cautioned to avoid conversing with the Student while he traveled the campus, due to his distractibility. While this caution mirrored the caution expressed by O & M consultant who was working with the Board at the Board schools, the Board staff expressed their annoyance with the Perkins staff suggesting this during their observation. While the Board used this as another anecdote in their assertion that Perkins was inappropriate for the Student, on the contrary it showed that the Perkins staff had a reasonable understanding of the Student and his needs.

45. The O & M consultant noted that the Student's progress with him was inconsistent. The consultant was working on teaching the Student the use of the long cane, but the Student was still having difficulty in the ability to use the cane in the prescribed manner and interpreting the information from the cane. Learning the use of the long cane is a long process, and the Student will require additional training on the methods for using the long cane. [Testimony Mr. Webb]
46. In determining the level of service for the Student, the BESB O & M consultant must factor in his own availability and caseload. The BESB consultant testified that he can't provide everything that is needed. [Testimony Mr. Webb] The O & M training proposed in the 2006-2007 is based on the consultant's availability, and is insufficient to meet the Student's needs.
47. As of this hearing, the Board had not developed a schedule for the Student, had not consulted with the BESB O & M consultant to work on orientation and mobility issues for the new setting at the Board high school, nor had they developed a transition plan or contacted Perkins to work on a transition of the Student from the Perkins setting to the Board high school. [Testimony Ms. Leffert, Ms. Smith] While the Board special education coordinator testified that they have the "skill set" for transition, no plan was made for this particular Student. [Testimony Ms. Giaquinto] The TVI, who each Board staff indicates is essential to the Student's program, didn't know whether the Student was returning to the Board high school for the 06-07 school year, and did not ask anybody about that. [Testimony Ms. Uhrynowski] The Board did not appropriately prepare to transition the Student back to the Board high school for the 2006-2007 school year.
48. The physical layout of the Board high school includes three floors with connecting hallways. The Student's program would require that he use all three floors. Approximately 1200 students attend the Board high school. [Testimony Ms. Smith] The planning has not yet been completed to identify the environmental barriers to the Student's education. [Testimony Ms. Giaquinto] This environment, particularly with the lack of appropriate supports for the Student, is not appropriate.
49. The Student's needs are met at the placement at Perkins. He needs basic foundation in communications, functional academics, daily living skills, and self advocacy skills. With the appropriate level of support at Perkins, the Student has the potential to be more independent. [Testimony Ms. Fitzgerald]
50. The Board staff agreed that small group instruction was appropriate for the Student. [Testimony Ms. Leffert] That small group instruction is provided at Perkins School for the Blind.
51. At Perkins, the Student is taught orientation and mobility by a certified orientation and mobility teacher, and he is working on use of a long cane to aid in his

- independent movement. Almost all of the Student's academic teachers are teachers of the visually impaired, and all students in the program are given the expanded core curriculum for students with a visual impairment. [Testimony Ms. Fitzgerald]
52. The expanded core curriculum [ECC] is based on research which has provided a guide for teaching students who are visually impaired or blind. The ECC identifies eight categories of specific skills that are necessary for students who are visually impaired or blind. Research has shown that the students need direct and systematic instruction in the eight areas. These areas include compensatory and functional academics; orientation and mobility to teach students to move around in their environment with more independence; social interaction skills to learn to pick up on cues ; independent living skills that must be modified for the blind or visually impaired, as they cannot learn merely by observing a skill; recreation and leisure skills for programming and direct instruction on how to become direct participants; career education; use of assistive technology; and visual efficiency skills which includes learning strategies to use their residual vision. [Testimony Ms. Fitzgerald]
53. The Perkins staff is familiar with students with CVI, as it is a common diagnosis for their population. [Testimony Ms. Essex]
54. The Student's current program at Perkins is a ninth grade curriculum based on the expanded core curriculum. He has academic classes including science, math, social studies, and English/language arts. He also has vision stim, adaptive PE, home and personal management, orientation and mobility, community experience; physical therapy as a direct service, speech and language, social skills group, group counseling, individual counseling, computer and technology, swimming, theater arts and voice. [Testimony Ms. Fitzgerald]
55. The residential program is necessary for the Student as he has significant needs in daily living skills and in social interactions, and requires this structure. [Testimony Ms. Essex] There is no place similar to Perkins in the state of Connecticut. [Testimony Ms. Uhrynowski]

DISCUSSION/CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA] provide for services to children with disabilities, from birth through age 21. It is undisputed that the Student is eligible for special education and related services.

I. Burden of Proof

The Supreme Court addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. 49, No. 04-698 (U.S. 2005). In *Schaffer*, the Court noted that states have responsibility generally for establishing fair hearing procedures. The plain text of IDEA is silent in the allocation of the burden of persuasion, as was the Maryland state law. Under those circumstances the Court found that the burden of persuasion/burden of proof falls upon the party seeking the relief. The Court declined to decide the issue of the burden of proof when states have their own laws or regulations which place the burden on the school district.

In Connecticut, the regulations expressly state that the Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 The Board has not met its burden in this case.

II. Free Appropriate Public Education

The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

No claim has been made that the Board has not complied with the procedural requirements of the Act, and is found that there are no procedural violations which rise to the level of a violation of a free appropriate education program [FAPE].

In determining whether the second prong of *Rowley* met, the requirement of a free appropriate public education is satisfied by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. *Board of Education v. Rowley*, 458 U.S. at 203

The IEP should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Hendrick Hudson v. Rowley* 458 U.S. at 204 When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* This standard contemplates more than mere trivial advancement. *Id.*

In determining whether the IEP was reasonably calculated to confer educational benefits, it must be determined whether the IEP states (1) the child’s present level of educational performance; (2) the annual goals for the child, including short-term instructional objectives; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a

school setting; (5) the projected initiation date and duration for proposed services; and (6) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *M.S. v. Yonkers*, 231 F. 3d 96 (2nd Cir. 2000), *citing Walczak v. Florida Union Free School*, 142 F. 3d 119, 122.

The Board's proposed IEP for the 2006-2007 school year was not appropriate. It was not reasonably calculated to enable the Student to obtain education benefit. It was not drafted based on the Student's individual needs, and failed to provide the appropriate services for the Student to obtain educational benefit.

The Student has complex needs that have significantly interfered with the Student's educational performance. But, even in light of this, the Board did not propose sufficient supports and services for the Student. The Board's proposed program does not reflect nor does it address the Student's critical concerns and needs. No direct services from the TVI were offered, no paraprofessional support was delineated in the IEP. The orientation and mobility services were insufficient. No plan was made for the Student's transition back to the high school; the TVI did not even ask anyone whether the Student was returning for the 2006-2007 school year. The TVI herself, who was deemed crucial and critical to the Student's program, has demonstrated in her testimony that she would not provide an appropriate program to the Student, and has demonstrated that she would be an inappropriate member of the Student's team. No other TVI is available for the Student, and the Board's reliance on this inappropriate TVI further demonstrates that even if there were a personnel change for the teacher of the visually impaired, the Board could not and did not appropriately program for Student. The Board's program for the 2006-2007 school year did not offer the Student a free appropriate public education.

When it is determined that the Board's program is inappropriate, the parent is entitled to reimbursement if the parent's private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985)

Parents seeking an alternative placement are not subject to the same mainstreaming requirements as a school board. *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) Under the appropriate standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), citing *Florence County School District Four v. Carter*, 501 U.S. 7 (1993) Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education. *Id.* The Student would not receive an appropriate education in the program proposed by the Board.

The issue remains as to whether the Parents' placement of the Student is appropriate. The testimony of the Perkins program supervisor and the case manager demonstrate that the program is appropriate for the Student. While the Board claims that its observation of the placement and the school work/data provided by the Perkins School demonstrated that the placement was inappropriate, that is unpersuasive. The Student is learning independence and the appropriate skills in accordance with the expanded core curriculum, individualized to meet his unique and complex needs at Perkins. The Parents' placement of the Student at the Perkins School for the Blind for the 2006-2007 school year is appropriate.

FINAL DECISION AND ORDER:

1. The Board did not offer an appropriate program for the Student for the 2006-2007 school year.
2. The Student shall be placed at the Perkins School for the Blind for the 2006-2007 school year in order to receive an appropriate program to meet the Student's needs. That placement shall include the residential portion of the program.