

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. West Hartford Board of Education

Appearing on behalf of the Parents:

The Parents initially appeared *pro se*. During the hearing, the Father, an attorney, filed an appearance on behalf of the Parents.

Appearing on behalf of the Board:

Attorney Susan C. Freedman
Shipman and Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Appearing before:

Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board offered the Student an appropriate program for the 2004-2005 school year.
2. If not, whether the Parents' placement of the Student for the 2004-2005 school year at Ben Bronz Academy was appropriate.
3. Whether the Board offered the Student an appropriate program for the 2005-2006 school year.
4. If not, whether the Parents' placement of the Student at Ben Bronz Academy for the 2005-2006 school year was appropriate.
5. Whether the Board has (a) failed to consider private evaluators and parental concerns in offering a program; (b) whether the Board staff delayed the Parents access to educational records; (c) whether the Board delayed in providing the Parents access to a continuum of services; (d) whether the Board failed to provide the Parents with prior written notice.
6. Whether the Board actions in any of those alleged in issue 5 (a-d) constituted procedural violations which have resulted in a denial of the Student's free appropriate public education.

SUMMARY:

The 10-year-old Student who has been diagnosed with developmental dyspraxia and ADD – inattentive type was identified as eligible for special education and related services prior to entering the Board schools in her kindergarten year. She attended the Board schools from kindergarten through her second grade year receiving resource room assistance and related services. The Parents unilaterally placed the Student at Ben Bronz Academy for her third and fourth grade years, and brought this action challenging the appropriateness of the Board's proposed programs for the 2004-2005 and 2005-2006 school years, and claiming that procedural violations resulted in a denial of the Student's free appropriate public education.

PROCEDURAL HISTORY:

The Parents filed this request for hearing on June 30, 2005. The hearing dates were initially extended at the request of the Parents so that the parties could engage in settlement discussions. The first hearing date convened on August 4. The next hearing date of October 13 was cancelled at the request of the Parents. At the parties' request, the hearing continued in November 2005. The hearing proceeded for a total of eighteen hearing dates, concluding on April 12, 2006. Briefs were filed on May 31, 2006.

Some of the delay in concluding this hearing at an earlier date related to uncommon, unanticipated problems that occurred during the course of the hearing.¹ In addition, the parties were given substantial latitude in presenting their case, including the Parents who initially presented their case as pro se parties. The Parents were permitted to present substantial evidence in detail about the Student and the progress the Parents and their consultants perceived the Student made in her educational history.

On the 13th hearing date, the Father, who is an attorney licensed to practice in this state, stated on the record that he was formally filing an appearance on behalf of the Parents, and representing the Parents as counsel.

The Parents' witnesses were the Student's Aunt; Susan Leclair Sharp, the education director of Ben Bronz Academy; Miriam Cherkes-Julkowski, education consultant; the Mother; and the Father.

The Board's witnesses were Kathleen Rotchford-McKay, former Board special education department supervisor; Margaret Flower, Board special education teacher; Joan McNulty, Board speech and language pathologist; Margery Stahl, Board school psychologist and Deborah Abraham, Board regular education teacher.

¹ For example, on the fourth day of hearing, the Mother was scheduled to testify for the Parents' case, but the Mother had inadvertently taken medicine which made her drowsy, so the Parents were unable to proceed on that date. On the eighth hearing date, the Board's attorney reported that the Parent was in a car accident the prior night and was not feeling well enough to appear at the hearing on that day.

An extensive number of exhibits were submitted by both parties. The Parents submitted 180 exhibits; the Board submitted 83 exhibits. While every exhibit is not listed in the findings of fact, all exhibits submitted by the parties were carefully reviewed and afforded their due weight.

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 ten years old, and is concluding her second year at Ben Bronz Academy, a private special education school, where she was unilaterally placed by the Parents in fall 2004.
2. It is undisputed that the Student is eligible for special education and related services under the category of speech/language impaired.
3. Prior to moving to the Board school system in September 2001, the Student was identified as eligible for special education by the Bolton schools. [Testimony Mother, Exhibits P-5, P-8]
4. When the family moved to West Hartford, the Student continued to be eligible for special education, and the Board initially implemented the Student's Individualized Education Program [IEP] as written by Bolton. At the initial Planning and Placement Team [PPT] meeting in September 2001, the Board recommended that a speech and language evaluation of the Student be completed. [Testimony Ms. Rotchford-McKay, Exhibit B-1]
5. The speech and language evaluation conducted in fall 2001 concluded that the Student's overall articulation skills were below age level expectations, making the Student's conversational speech difficult to understand. Based on this assessment, the PPT agreed to change the Student's mandation to speech and language impaired. [Exhibit B-2]
6. The Board has completed comprehensive and appropriate evaluations of the Student throughout the time she has attended the Board schools.
7. In September 2002, during the Student's first grade year, the Board recommended that the Student undergo additional assessments. The Parents consented to complete psychological, educational, behavioral, occupational and language assessments. [Exhibit B-6]

8. In the occupational therapy evaluation, it was noted that the Student's responses were somewhat under reactive, and that the Student appears to require greater input than typically expected. Application of sensory stimulation had a positive effect on the Student's level of arousal. Visual memory and visual closure were noted as more difficult for the Student in this evaluation. The occupational therapist indicated that the Student responded positively to sensory input, and this input, or sensory diet, was recommended as something that could potentially contribute to the Student's ability to actively participate in her school day. [Exhibit B-9]
9. The speech and language pathologist completed her evaluation in October and November 2002. This evaluation recommended that an educational program be developed for the Student with a focus on increasing the accuracy of expressive language, increasing recognition of use of negation, increasing use of expressive language for problem solving and using intact social conventions to access peer communications. [Exhibit B-11]
10. The school psychologist and the special education teacher completed a psychoeducational evaluation of the Student in November 2002. In this evaluation, it was found that the Student's overall cognitive ability was in the high average range, with cluster scores from average to high average. Academically, it was found that the Student was performing within the average to high average range of functioning in all subject areas with specific weaknesses noted in written language. It was noted that the Student's exceptional reading abilities, as well as her cognitive abilities, assist her in comprehending and performing to grade level. Weaknesses in pragmatic language, articulation, behavior management and anxiety play a significant role in the integration of all the processes of written language. Behaviorally, it was noted that the Student was demonstrating weaknesses in adaptive skills, including self care, communication and social skills. It was noted that comparing teacher reports to parent reports on daily functioning and behavior, the Student demonstrates less severe difficulties at school, but further noted that the language and motor weaknesses negatively impact her daily functioning. [Exhibit B-12]
11. Results of these evaluations were discussed at the November 20, 2002 PPT, at which the team also recommended that a physical therapy evaluation be completed. [Exhibit B-13]
12. On November 25, 2002, the Student was evaluated by a neuropsychologist, Dr. Gary Isenberg, at the request of the Parents. This neuropsychological evaluation was completed during the same time as the Board was conducting its own evaluation of the Student. The Parents did not proceed with the neuropsychological evaluation because they disagreed with the Board's evaluation of the Student, nor did they wait until the Board's evaluation was completed and reviewed by the PPT before they had the Student evaluated by Dr. Isenberg. [Testimony Mother, Father]

13. Dr. Isenberg's noted that overall the review of records and results of the evaluation indicate that the Student is a child with average overall intellectual ability, and that the results do not give evidence of a specific academically based learning disability. He observed that the Student shows significant processing deficits in several domains, including fine and gross motor dexterity, motor planning, attentional continuity, visual-motor integration, and in organization and planning ability. He further noted that the Student gives evidence of significant oral-motor difficulties and disruptions in verbal fluency. Dr. Isenberg observed that the Student's expressive language was significant for articulation difficulties, oral motor coordination deficits, word substitution/errors and immature grammatical structure. He found that the Student presents with poor verbal sequencing skills, inconsistent word retrieval, and weaknesses in social communication. Dr. Isenberg found that the Student had difficulty integrating receptive and expressive language in a consistent manner, particularly during spontaneous speech. Additionally, Dr. Isenberg noted that the Student gives evidence of difficulty establishing and sustaining the optimal level of physiological arousal for completing/persisting with tasks during the school day, becoming easily fatigued and shutting down in response. [Exhibit B-14]
14. Dr. Isenberg concluded that the Student's difficulties are best understood as a mild neurological processing impairment, a neuro-developmental processing disorder. Within diagnostic term, Dr. Isenberg found that the Student met the specific criteria for developmental dyspraxia and attention deficit disorder, inattentive subtype. Dr. Isenberg's evaluation also noted that children with developmental dyspraxia typically show a pattern of improvement over time as a function of brain maturation. [Exhibit B-14]
15. Dr. Isenberg's recommendations included allowing the Student to take breaks when the Student shuts down; breaking tasks into shortened segments; assisting the Student in developing awareness of her processing differences; engaging the Student with an easily accomplished task and incrementally increasing the difficulty; allowing the Student "choice points" where she can select the task; and breaking down complex skills into component tasks with over learning and fluency drills. [Exhibit B-14]
16. Dr. Isenberg recommended that ongoing speech and language therapy will also be an important aspect to educational intervention, with direct services to focus on articulation, linguistic retrieval, grammatical structure and sequencing, as well as social communication. Dr. Isenberg suggested that the therapist should also consult with the Student's mainstream class teacher in terms of informing teaching strategies and appropriate classroom modifications. Dr. Isenberg also recommended that the Parents might consider private speech and language therapy. [Exhibit B-14]

17. Continued occupational therapy was recommended by Dr. Isenberg, with ongoing assistance with fine motor and visual motor integration skills, motor planning skills and sensory integration issues. Sensory integration therapies were also suggested to maintain a more optimal level of arousal for the Student. [Exhibit B-14]
18. Dr. Isenberg explained that the Student would require more support than the typical child when engaged in mainstreamed learning activities, to help orient her to new tasks/activities and to prompt her through more complex tasks, as well as emotional support and nurturing to meet the demands of the school day. It was recommended that the Student would benefit from ongoing access to resource room support so that she can receive instruction at a pace/level tailored to her abilities, with pre-teaching and over learning strategies emphasized. Dr. Isenberg also recommended modifications to the school environment, including preferential seating, orienting cues, shortened assignments, immediate feedback and positive reinforcement. [Exhibit B-14]
19. All of Dr. Isenberg's recommendations and conclusions contemplated a mainstream setting for the Student, with resource room and related services support.
20. In February 2003, the PPT convened to consider the neuropsychological evaluation of the Student that was completed by Dr. Isenberg. The school members of the PPT reviewed the evaluation, and discussed it at the PPT meeting. The Student's primary disability was changed to neurological impairment at this PPT meeting. The Student's IEP was revised in response to the recommendations on the evaluation, with the addition of physical therapy and counseling services. The IEP also reflected Dr. Isenberg's recommendations for reduced amount of work, choice of tasks at appropriate time and positive reinforcement, as well as numerous other appropriate modifications and adaptations, related to extra time, preferential seating, study carrel, cuing expected behavior and immediate feedback. The modifications/adaptations included more than 20 modifications that were consistent with Dr. Isenberg's recommendations. [Testimony Ms. Rotchford-McKay, Exhibit B-16]
21. On May 8, 2003, the PPT reconvened, at which time Dr. Isenberg attended. [Testimony Mother, Exhibit B-19] Dr. Isenberg was given sufficient opportunity to speak and summarize his findings. [Testimony Ms. Rotchford-McKay] The Parents were concerned that the school based members of the PPT shared information about the Student's progress at the start of this PPT meeting, rather than allowing Dr. Isenberg to present at the outset of the meeting. The Mother testified at the hearing that the staff was sharing "anecdotes" about the Student rather than deferring to Dr. Isenberg's report earlier in the meeting. These teacher, staff and parental reports are not merely "anecdotes," but are essential in that they must be shared during a PPT meeting as part of the collaboration process. This collaboration is necessary to the appropriate review of the Student's

- progress and development of an appropriate program. This sharing of information is essential for all PPT members to be aware of, and would be of assistance to Dr. Isenberg to ensure that he knew how they were implementing the service, and show progress made since the evaluation. [Testimony Ms. Rotchford-McKay] At the PPT meeting, Dr. Isenberg gave the PPT a global picture, based on what he suggested they should focus on. Dr. Isenberg did not make a recommendation for an out of district placement, and did not recommend that the Student required a more restrictive educational setting. Dr. Isenberg's report validated how the Board staff was implementing the Student's program and confirmed that the connection to a general education classroom was the key to the success of the Student's program. [Testimony Ms. Rotchford-McKay]
22. In May 2003, the Parent expressed concerns about the Student's current levels of functioning, and they were concerned about the school staff's ability to implement the program. At that time, the Parents requested review of the Board's adjusted curriculum [AC] program for children with language based learning disabilities, as it was their belief that that was an appropriate placement for their daughter. The Board did not believe that the Student demonstrated the learning needs to be in the AC program, and felt that the Student was making good progress at Morley School, the Student's neighborhood elementary school. [Testimony Ms. Rotchford-McKay]
23. At that time, the Parents raised concerns about difficulties with the Student in that she didn't like school and was having great difficulty completing homework. The school members of the PPT team discussed ways to assist with that, but noted that in the school setting, they didn't see those kinds of issues and behaviors. [Testimony Ms. Rotchford-McKay]
24. Although the Board members of the PPT did not consider the Student an appropriate candidate for the AC program, the Board deferred to the Parents' interest in the program. The Parents were afforded an opportunity to review the AC program at the Board Duffy elementary school, and a referral packet was submitted to the AC program. The Parents were aware that the students recommended for the AC program were reading two years lower than their grade level, and that the Student was not reading two years lower than her grade level at that time. The Student was not accepted to the AC program. [Testimony Mother, Ms. Rotchford-McKay]
25. The Board offered the Parents a PPT meeting at the beginning of the 2003-2004 school year, which was to be scheduled for August 26. The Parents left a voice mail message with the Board that they were declining that PPT meeting. The Mother testified at the hearing that at that point, the Parents had decided to just let the school program fail the Student and go from there. [Testimony Mother]
26. At the Parents' request, Wendy Marans completed a speech and language evaluation for the Student in September 2003. [Testimony Mother, Exhibit B-26]

- Ms. Marans' findings were discussed at the PPT meeting in December 2003, and fully considered by the members of the PPT. Ms. Marans had sufficient opportunity to present her findings at the PPT meeting. [Testimony Ms. Flowers] The results of the speech and language evaluation completed by Wendy Marans were consistent with the results of the Board's speech and language evaluation. [Testimony Mother; Exhibit B-11, B-26]
27. In response to parental concerns regarding the Student's social interactions, during the 2003-2004 school year the school psychologist completed playground observations of the Student to determine to what extent the Student was engaging in positive peer activity, including greeting peers appropriately, initiating and maintaining appropriate conversation and joining and maintaining group play activities. The Student was found to be engaged in positive peer interactions 71 percent of the observed times, as compared with a typical peer who was engaged in positive peer interactions 66 percent of the time. The evaluator concluded that the Student was indistinguishable from her peers. [Testimony Ms. Stahl, Exhibit B-28]
28. The Student made progress during her second grade year in 2003-2004, obtaining mastery on many of her objectives, and progressing satisfactorily on her remaining goals and objectives. [Testimony Ms. Villanova, Exhibit B-37] The Student made growth and progress based on the same tools used to measure her performance as any child in the second grade was measured. [Testimony Ms. Villanova] The district wide assessments demonstrated that the Student made good progress in second grade. [Testimony Ms. Flower] The Student benefited from the opportunity to be with her neighborhood typical peers. [Testimony Ms. Villanova]
29. The Student's second grade regular classroom teacher was well trained to provide all of the Student's modifications/adaptations in the regular classroom setting. The team worked well together to implement the Student's program, and the second grade teacher was fully prepared to provide the Student's program in the regular education setting. The accommodations/modifications provided to the Student were not difficult for the teacher to implement and were appropriate for the Student. [Testimony Ms. Abraham]
30. During the second grade school year, the Board social worker implemented a program for the Student and the rest of her class in the regular education classroom. This program of providing sensory breaks through games and activities benefited the Student, as well as her classmates. [Testimony Ms. Abraham]
31. The regular education teacher used a checklist to ensure that the Student's program was appropriately implemented in her classroom, and to monitor the Student's progress. The Student volunteered to participate in the classroom, and benefited from the peers in her class. [Testimony Ms. Abraham]

32. During the year, the regular classroom teacher participated in team meetings to coordinate with the resource room teachers and related service providers. The team collaborated well to implement the Student's program. [Testimony Ms. Abraham]
33. The Parents expressed concern to the regular classroom teacher that they felt that the Student was not making progress, and asked the teacher to comment on their concerns. The Parents further offered to the teacher that they could meet "off site" to discuss this. The teacher declined this offer to meet "off site," and expressed discomfort in this offer from the Parents. [Testimony Ms. Abraham] It is found that teacher reported accurately to the Parents, and during the hearing, that the Student made appropriate progress during her second grade year.
34. During second grade the Parents complained to the classroom teacher about the amount of homework the Student had, as the Student was tired at night, and after horseback riding and other appointments, it was too much homework. In response to these Parental concerns, the classroom teacher told the Parents that homework was optional for the Student. [Testimony Ms. Abraham]
35. The Student's language art and math instructional levels were at grade level for all marking periods of second grade. The regular education teacher observed that the Student flourished in her program, developed self confidence and was able to work independently. The Student made great progress at her neighborhood school. [Testimony Ms. Abraham]
36. The PPT convened on May 24, 2004, to conduct an annual review. The PPT reviewed the Student's progress during the 2003-2004 school year and discussed recommendations for the Student's educational program. [Exhibit B-37] At the time of this PPT meeting the Student had demonstrated clear growth over all domains. She'd made progress academically, socially and developmentally. [Testimony Ms. Rotchford-McKay] The Student had met mastery in her reading, reading at the second grade level. It was noted at this meeting that the Student was becoming independent as a learner. The Parents noted at this meeting that the Student was more resistant to school. The social worker noted that the self assessment indicates satisfaction with many social areas and academic issues in school. [Exhibits B-37, P-154]
37. The Student's IEP for the 2004-2005 school year, included goals in the areas of improved motor control of the speech mechanism, increasing speech intelligibility, increasing the understanding of the use of the structure of language in the classroom, following rules of conversation with peers and adults, improving linguistic retrieval, improving basic reading skills, improving written language skills, participating in classroom based fine/visual and sensory motor activities, improved gross motor performance, age appropriate social and behavioral skills

- and increasing independence and accuracy in written expression. The program recommended for the Student included six hours of special education per week, including services from a speech and language pathologist, resource room assistance in reading and written language, occupational therapy, physical therapy, counseling and assistive technology. The Student's program included 27 hours of time with nondisabled peers per week. The program modifications and adaptations which were set forth in the IEP addressed the Student's educational needs for support in the regular classroom. [Exhibit B-37]
38. The Parents notified the Board in writing that they disagreed with the May 2004 IEP, by letter dated June 10, 2004, and notified the Board that the Student would attend Ben Bronz Academy for the 2004-2005 school year. [Exhibit P-165] By letter dated August 15, 2004, the Parents requested that the Board reimburse the Parents for the out of district unilateral placement. [Exhibit P-169]
39. After the 2003-2004 school year, the Student did not return to the Board schools. She was educated at the Ben Bronz Academy during the 2004-2005 and 2005-2006 school years. [Testimony Mother] Ben Bronz Academy is described as a private facility for learning disabled students, with approximately 50 students. The private school did not have a speech/language pathologist, an occupational therapist or school psychologist on staff during the 2004-2005 and 2005-2006 school years. [Testimony Ms. Sharp]
40. The PPT convened on October 28, 2004 to develop a private service plan for the Student. The Parents notified the Board that they were not going to attend the meeting as they were rejecting the "fair share plan." The record reflects that the Parents received appropriate notice for the meeting, and elected not to attend the PPT meeting. [Exhibit B-46, B-47]
41. On June 16, 2005, the PPT reconvened to develop a private service plan and an IEP for the Student for the 2005-2006 school year. A teacher from Ben Bronz academy attended the PPT meeting. Extensive goals and objectives were drafted in the areas of speech motor control/mechanism, speech sound production, respiration and phonation for improved speech intelligibility, understanding structure of language, speech/conversation, language/linguistic retrieval, reading skills improvement, written language, occupational therapy in fine/visual and sensory motor based activities, daily living skills, social and behavioral skills, written expression and gross motor performance. The Student's program included speech and language therapy, resource room for reading and written language, occupational therapy, physical therapy and assistive technology. The Student's program for the 2005-2006 school year included 27 hours of time per week with nondisabled peers, and 4.5 special education hours per week. Appropriate modifications and adaptations were included in this IEP. [Exhibit B-48]

42. The Parents received numerous copies of their procedural safeguards from the Board. [Testimony Mother, Father]
43. The Parents were always given more than sufficient time to discuss their concerns about the Student during PPTs and with the school staff. The exhibits submitted by the Parents included many emails from the Parents directed to the school staff.
44. While the Parents both testified that they had difficulty getting the Student to attend school while she was at the Board schools, this reported school aversion was not seen at school. [Testimony Mother, Father, Ms. Rotchford McKay]
45. The Parents were active participants in all PPT meetings, asking thorough questions and providing input. They were fully informed of all aspects of the Student's program and progress. The average length of the PPTs with the Parents was 1 ½ to 2 hours, much longer than an average meeting for other students. [Testimony Ms. Rotchford-McKay]
46. The Board staff members were fully responsive to the Parental concerns, and spent a tremendous amount of time with the Parents. The Board staff received many requests for information and about data collection, and reviewed the Student's program in response to Parental requests. The Board did substantial and comprehensive planning for the Student. [Testimony Ms. Rotchford-McKay]
47. The Parents were also afforded substantial time and opportunity to review all of the Student's educational records. [Testimony Ms. Rotchford-McKay]
48. While the Parents had determined at the end of the Student's second grade year that the school year was not successful for the Student, [Testimony Father] the record reflects that the Student progressed well in that school year.
49. During the hearing, the Student's Aunt, who has a master's degree in special education and is employed as a special education teacher in California, offered her opinion about the appropriateness of the Student's progress, noting that the child changed from first grade to the time she saw her in her third grade year. Those changes, however, were the type of maturation expected in all children. The Aunt noted that it is not best practice for a teacher to evaluate a relative, that she conducted no evaluation of the Student, and never observed the Student at Board schools. She based her position about the Student's progress on the information she received from her brother (the Father) and from the Mother. The Aunt did not observe the Student at the end of second grade, at which time the Parents decided on the placement at Ben Bronz. She also never observed the Student at Ben Bronz or ever talked to any of the teachers from Ben Bronz. [Testimony Aunt] The Aunt's testimony that the Student did not progress until she entered into the program at Ben Bronz is not supported by the evidence.

50. The testing completed by Ben Bronz Academy concluded that the Student was at grade level or slightly below in the language arts areas at the time the Parents unilaterally placed her at Ben Bronz. [Testimony Ms. Sharp]
51. Miriam Cherkes-Julkowski evaluated the Student in July 2005, more than a year after the Parents had placed the Student at the Ben Bronz Academy. [Testimony Dr. Cherkes-Julkowski, Exhibit P-177] The evaluation was completed after the IEPs for the 2004-2005 and 2005-2006 school years were proposed by the Board and rejected by the Parents, and after the Parents had requested a due process hearing and placed the Student at Ben Bronz Academy.
52. The Father, an attorney, has been a member of the bar since 1984, and is very familiar with court procedure and legal requirements. While the Parents were routinely provided notices of procedural safeguards, the Father testified that he had not read them to understand the process. He testified that he had glanced at the document, but never read it for content, noting that in his experience there are many, many documents that are produced for bureaucratic reasons that he doesn't read. [Testimony Father] Throughout the time that the Student has been enrolled in the Board schools, the Parents received appropriate notice of all PPT meetings, as well as their procedural safeguards.
53. The Mother also serves as an advocate in education disputes, working at times on a pro bono basis, and at times charging a fee for services of up to \$125 per hour. [Testimony Mother]
54. During all the PPTs when the Parents were present, they were afforded opportunity to ask questions, and develop the IEP. There was extensive input from the Parents. [Testimony Ms. Rotchford-McKay]

DISCUSSION/CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA of 2004], and its predecessor the Individuals with Disabilities Education Act [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.

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 met its burden in this case.²

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 Parents have made various assertions that the Board's actions have constituted procedural violations, asserting that the Board has failed to consider private evaluators and Parental concerns in offering a program, in that the Board staff delayed the Parents' access to educational records, in that the Board failed to provide the Parents with access to a continuum of services and that the Board failed to provide the Parents with prior written notice.

The Board has demonstrated that it carefully, patiently and fully considered all of the private evaluators and Parental concerns in offering appropriate educational programs to the Student. In fact, the evidence presented indicates that the Board staff was responsive to the numerous Parental requests and concerns, scheduled much more than the sufficient time necessary to address all concerns of the Parents during PPT meetings, and responded appropriately to the numerous and detailed inquiries and requests that the Parents

² The Supreme Court recently addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. ____, 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 a careful reading of the Court's decision in *Schaffer*, it is found that the Board continues to have the burden of proof in this state as is specifically stated in the regulations.

presented at meetings, in correspondence, and in the considerable number of emails directed to Board staff.

Nothing supports the claim that the Board staff delayed the Parents' access to the Student's education records, nor was there a delay in providing access to a continuum of services. The Board provided the Parents with all appropriate prior written notices, and the Parents were fully notified of and were able to understand their procedural safeguards. Nothing supports the conclusion that the Board violated the procedural requirements of the Act. It is found that the Board complied with all procedural requirements of the Act.

The second inquiry is a determination of whether the Individualized Educational Program [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

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 It is important to note from the outset that the Individuals with Disabilities Education Act (IDEA) does not itself articulate any *specific* level of educational benefits that must be provided through an IEP. The Supreme Court however, has specifically rejected the contention that the "appropriate education" mandated by IDEA requires states to "maximize the potential of handicapped children." *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2nd Cir. 1998), citing *Rowley, supra*. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* 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)

In determining whether the IEP is 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 Student's IEP meets these requirements. The Board's proposed programs for the 2004-2005 and 2005-2006 school years were reasonably calculated to allow the Student to receive educational benefits.

The Board appropriately drafted IEPs for the Student and offered an appropriate program. The Student was progressing well in her program at the Board schools prior to the Parents' unilateral placement of the Student, and the program was based on current evaluations, with appropriate goals and objectives.

The evaluation by Dr. Cherkes-Julkowski and her conclusions about the Student's progress were unpersuasive. Moreover, as in *B.L. v. New Britain Board of Education*, Dr. Cherkes-Julkowski reevaluated the Student after the IEPs had been proposed by the Board and rejected by the Parents, and after the Parents had requested a due process

hearing and placed the Student in the Ben Bronz Academy. The appropriateness of the education program must be considered in light of information available to the members of the PPT at the time the IEPs were developed. Therefore, the report by Dr. Cherkes-Julkowski is disregarded in this final decision. Under these identical circumstances, the U.S. District Court for the District of Connecticut ruled that because Dr. Cherkes-Julkowski's reevaluation was conducted after all of the pertinent events in this case, and, most importantly, after the Student had already received months of instruction at the Ben Bronz Academy, this exclusion is proper. *B.L. v. New Britain Board of Education*, 394 F. Supp. 2nd 522 (D.Conn. 2005), citing *Fuhrmann v. East Hanover Board of Education*, 933. F. 2d 1031, 1040 (3d Cir. 1993)("the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement")

The Student's proposed program for the 2004-2005 and 2005-2006 school years were also appropriate to meet the Student's educational needs in the least restrictive environment. While Dr. Cherkes-Julkowski opined that the Student required being with "authentic peers," that runs counter to the law's preference for increased time with nondisabled peers in a regular education setting. No other evaluators or educators who have worked with the Student support this conclusion. On the contrary, the record reflects that the Student received great benefit from placement at the neighborhood school. In the more restrictive setting, the Student loses the opportunity for appropriate language and social models. [Testimony Ms. Rotchford-McKay]

The program offered by the Board for both years was to be provided in the Student's neighborhood school with the appropriate related services and resource room support. IDEA's preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs. *Walczak, supra*. IDEA sets forth a strong congressional preference for integrating children with disabilities in the regular classrooms. *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993) School districts must evaluate whether a child with a disability can be educated in a regular education classroom if provided with supplementary aids and services. *Oberti*, 995 F.2d at 1216; *Mavis v. Sobol*, 839 F.Supp. 968, 985-986. The Act's least restrictive environment requirement is met when the child with a disability is educated in the regular classroom, or when the child who cannot be fully included is mainstreamed to the "maximum extent possible." *Oberti*, 995 F.2d at 1217 The Student can be educated in the regular classroom for a substantial portion of the week with appropriate supports, modifications, accommodations as set forth in the Board's IEPs. Moreover, the evidence presented indicates that the Student benefits from the experiences of the regular education setting with her nondisabled peers.

In evaluation of a program, the appropriate standard is whether the Student can derive meaningful educational benefit from the proposed program, not everything that might be thought desirable by loving parents. *Tucker v. Bay Shore Union Free School District*, 873 F. 2d. 563, 567 (2nd Cir. 1989) The Parents demonstrated that they are ardent advocates of their child, and want what they have determine would be the best for their child.³ The Parents can decide to educate the Student in a school of their choice, but it

³ COMMENT ON THE CONDUCT OF THE PROCEEDINGS: There can be a fine line between ardent advocacy and inappropriate demeanor and actions during a hearing. That line was crossed at times by the

is not the Board's responsibility to fund such a placement when it is determined, as it is here, that the Board has proposed an appropriate program and placement for the Student.

The program and placement proposed by the Board is appropriate for the Student, considers her strengths and weaknesses and is developed so that the Student can derive meaningful educational benefit.

When it is found, as it is in this instance, that the Board's program is appropriate, it is not necessary to determine the appropriateness of the Parents' proposed placement. *See, Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), *Florence Co. School District v. Carter*, 114 S. Ct. 361 (1993) (Reimbursement for a private school placement is only awarded *when the district's program was not appropriate* and when the private placement could provide an appropriate educational program for the child) The Board's proposed programs for the 2004-2005 and 2005-2006 would provide the Student with a free appropriate public education.

FINAL DECISION AND ORDER:

1. The Board offered the Student an appropriate program for the 2004-2005 and 2005-2006 school years.
2. As the Board's program is appropriate, it is not necessary to determine whether the Parents' placement of the Student at Ben Bronz Academy is appropriate.
3. The Board did not fail to consider private evaluators and Parental concerns in offering a program, did not delay the Parents access to educational records, did not delay in providing the Parents access to a continuum of services, and did not fail to provide the Parents with prior written notice.

Parents, particularly the Father. While the Parents actions were inappropriate at times, no negative inferences were drawn from the actions in deciding this case. In light of the frequency of these actions, including the Father arguing with the hearing officer, interjecting inappropriate interruptions, and having an unprofessional and disrespectful demeanor -- even when the hearing officer ruled in the Parents' favor -- it should be noted that these actions are inappropriate. During the hearing the Parents were informed of this, and it would be remiss not to include a discussion of these actions in this final decision.

4. The Board's actions were not procedural violations, and the actions have not resulted in a denial of the Student's free appropriate public education.