

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Region 9 Board of Education

Appearing on behalf of the Parents: Attorney Jennifer Laviano
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Appearing on behalf of the Board: Attorney Michael McKeon
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Appearing before: Attorney Brette H. Fitton
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board's program for the 2011-2012 school year provide Student with a Free Appropriate Public Education ("FAPE") in the Least Restrictive Environment ("LRE")?
2. Did the Board's program for the 2012-2013 school year provide Student with a FAPE in the LRE?
3. Did the Board violate Student's Procedural Safeguards by:
 - a. failing to conduct a Functional Behavioral Assessment;
 - b. failing to complete an evaluation in a timely manner;
 - c. failing to have appropriate Individualized Education Programs in place by the first day of the 2011-2012 and 2012-2013 school years;
 - d. not considering the use of Assistive Technology in Student's program; and/or
 - e. failing to maintain a continuum of appropriate placements?

PROCEDURAL HISTORY:

On June 4, 2013, the Region 9 Board of Education received a Request for a Special Education Due Process Hearing and the undersigned hearing officer was appointed. A prehearing telephone conference was held on July 10, 2013 and the original deadline for the mailing of the Final Decision and Order was established as August 16, 2013. During the prehearing conference, Attorney for Parent requested an extension of the deadline for the mailing of the Final Decision and Order and Attorney for the Board consented to this request. A new deadline for the mailing of the Final Decision and Order was set for September 15, 2013. Hearing dates in this case were scheduled for September 13, 2013, September 20, 2013 and September 24, 2013. In an email dated September 5, 2013, Attorney for the Student requested that the hearing dates of September 13, 2013 and September 20, 2013 be postponed in order to permit the parties to instead hold a PPT meeting on that date to review the results of Student's Triennial evaluation. Attorney for the Board also requested an extension of the deadline for the mailing of the

Final Decision and Order, so that the first date of hearing did not fall beyond the existing deadline. These requests were granted and the new deadline for the mailing of the Final Decision and Order was set for October 15, 2013. At the first date of hearing an extension of the deadline to mail the Final Decision and Order was requested and granted on the record. A new deadline for the mailing of the Final Decision and Order was set for November 15, 2013. On October 23, 2013, Attorney for the Student requested an extension of the deadline for the mailing of the Final Decision and Order. This request was granted and a new deadline for the mailing of the Final Decision and Order and deadline was set for December 15, 2013. Another request for extension of the deadline for the mailing of the Final Decision and Order was requested and granted to allow for additional hearing dates. The revised deadline was set for January 15, 2013. On January 14, 2014, the final date of hearing in this case, a briefing schedule was set. The deadline for the submission of briefs to the Hearing Officer was set at February 24, 2014. An extension of the deadline for the mailing of the Final Decision and Order was requested in order to accommodate the briefing schedule. The extension request was granted and the deadline for the mailing of Final Decision and Order was extended to Friday March 14, 2014. On February 17, 2014, Attorney for the Board requested that the briefing deadline be extended to February 27, 2014. On February 25, 2014, Attorney for Student requested that the briefing deadline be extended to March 3, 2014 and that the deadline for mailing the Final Decision and Order be moved to March 20, 2014. Both requests of Attorney for the Board were granted on February 25, 2014.

This hearing was held on the following dates: September 24, 2013, October 9, 2013, December 3, 2013, December 4, 2013, December 12, 2013, December 13, 2013, and January 14, 2014. The Parent's witnesses were the Father; Dr. Melissa Olive (Dr. Olive), Susan DeVol (Teacher), and Dr. Elizabeth Sellinger (Dr. Sellinger). The Board's witnesses were Maggie Egan (Case Manager), Maryanne Pieratti (School Social Worker), Rebecca Hoyt (School Psychologist), and Patricia Roszko, Director of Pupil Services (Director). The Request for the Due Process Hearing was entered as Hearing Officer Exhibit 1. The Parents submitted exhibits numbered P-1 to P-17 and the Board submitted exhibits numbered B-1 to B-36, which were entered as full exhibits.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

RULING ON OUTSTANDING MOTIONS AND OBJECTIONS:

All motions and objections not previously ruled upon, if any, are hereby overruled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

SUMMARY:

The Student is a 17 year old boy, who is currently enrolled in the in the Joel Barlow High School in the Region 9 School District. He is eligible for Special Education under the disability category of Other Health Impairment (“OHI”) - Attention Deficit Disorder (“ADD”)/Attention Deficit Hyperactivity Disorder (“ADHD”). The Student claims he was denied FAPE in the LRE for the 2011-2012 and 2012-2013 school years and that the Board committed several other procedural violations of the Individuals with Disabilities Education Act (“IDEA”). Student claims that an Applied Behavioral Analysis program overseen by a BCBA is a necessary component to his Individualized Education Program. Board disagrees.

FINDINGS OF FACT:

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following facts:

1. Student was born on 12/27/1996, and is now 17 years of age. (Testimony of Father; HO-1, B-1)
2. Student’s eligibility category for Special Education under the IDEA is OHI - ADD/ADHD Disorder (Testimony of Father; B-1)
3. Student came to live with his adoptive parents at the age of 9. (Testimony of Father, 9/24/13, P-13). Prior to enrollment in the Region 9 School District, Student was enrolled in the Redding School District. (Testimony of Father, 9/24/13, P-13)
4. Student suffered significant abuse and neglect at the hands of his biological family until he was removed from the home when he a small child. (P-13) Student’s childhood trauma was exacerbated by the disruption of subsequent foster home placements, two psychiatric hospitalizations and placement in a residential facility. (Id.)
5. In addition to a diagnosis of ADHD, Student has a diagnosis of Reactive Attachment Disorder (“RAD”) and experiences sensory issues. (P-13, Pg. 10)
6. There is documentation of Student’s struggle completing homework as far back as 2007. (P-13 Pg. 2-3).
7. The Student’s Goals and Objectives in his 9th Grade IEP (2011-2012) were the result of collaboration between the staff from the Redding School District and the staff of Joel Barlow High School in 2013. (Testimony of Director; B-1)
8. Significant communication and planning took place in preparation for Student’s transition from the 8th grade in the Redding School District to Joel Barlow High School in Region 9 District. This included arrangements for Student to have multiple visits to the high school in advance of enrollment and a PPT meeting with staff from Redding and Region 9 to address planning for the transition to high school. (Testimony of Father, Testimony of Director, B-1) In addition, prior to attending the joint PPT meeting, the Director attended other PPT meetings for the Student. (Testimony of Director)

9. The PPT meeting held on 5/13/2011 to address Student's transition to high school included a list of PPT recommendations. (B-1) Among these recommendations were putting an accountability system in place to start the school year and a Behavior Intervention Plan ("BIP"). (B-1) The Special Factors section of the 5/13/2011 IEP indicates that a BIP was developed and that IEP Goals and Objectives have been developed to address the behavior. (Id.)
10. The list of accommodations for Behavioral Intervention in the 5/13/2011 IEP included: behavior plans, break between tasks, de-escalation strategies, modeling expected behavior by adults, proximity/touch control. (B-1) The accommodations to address Student's organizational issues included an assignment pad, daily planner check, extra space for work, folders to hold work, and post assignments. (Id.)
11. The 5/13/2011 PPT Meeting Summary includes a report from a School Based Team Member from the Redding School District that Student had weaknesses remembering to hand in work, organization, following time-lines, and remembering to bring home all homework materials. Redding School District PPT Members also reported that Student had a Behavior Plan and that many adjustments were made to the Behavior Plan throughout the year. (Id.) It was also stated that Executive Functioning piece will be the greatest challenge. (Id.)
12. Appended to the official 5/13/2011 IEP was a document with the title Behavior Plan Modifications. This document indicates that the existing Middle School behavior plan would remain in effect with one modification: the addition of a "reflection" component to be instituted when the Student was referred to the office. (B-1) The Middle School Behavior Plan targeted the behavior of compliance and had 5 components including: a break pass, identifying positives, a social script, praise and weekly locker checks. (B-1)
13. Concerns were noted at the 5/13/2011 PPT that consequences for Student behavior that are not immediate are not effective. (B-1)
14. On the Transition Planning page of the 5/13/2011 IEP, the Post-School Outcome Goal Statement - Post-Secondary Education or Training was identified as "Upon graduation, [Student] will attend the post-secondary program of his choice (ie two yr, four yr, technical)". (B-1) The Transition Planning Goal for Employment was noted as "Upon graduation, [Student] will have part-time employment in his local community or school environment. (Id.)
15. The PPT determined that the course of study needed to assist the Student in reaching the 5/13/2011 IEP Transition Planning Goals and Related objectives would "... include (including general education activities: general college preparatory with support for developing executive functioning skills, and quarterly meeting with Transition Coordinator". (B-1)
16. The Academic Goals listed on the 5/13/2011 IEP were "[Student] will complete assignments." and Student will "[d]emonstrate an improvement in organization, study skills." (B-1)
17. The Social/Behavioral Goals in the 5/13/2011 IEP were "[Student] will demonstrate an improvement in social skills" and [Student] will demonstrate an improvement in decision-making skills.
18. A Progress Report on IEP Goals and Objectives was issued on 2/20/2012. (B-6) Progress on both

Academic Goals were listed as Satisfactory, with Mastery noted in three Objectives: turning in assignments, utilizing checklists for entering/transition into classroom and beginning task, and checking assignment pad and reviewing with content lab teacher during class on what materials need to be brought home to complete academic tasks. (Id.) Progress on the Social/Behavioral Goal of social skills improvement was indicated as Satisfactory and the progress on the Goal of demonstrating an improvement in decision-making skills was noted as Limited Progress. (Id.) Limited progress on the Objective of with adult facilitation, demonstrating the ability to accept responsibility for the consequences of his actions without trying to shift the blame to others or create excuses, was also noted. Id.

19. A PPT meeting was requested by the family and held on 2/28/2012. (B-7) Parent concerns at that time were listed as concerned about executive function, organization and follow through. (Id.)

20. On 2/28/2012, the PPT recommended consultant services to look at approaches for executive functioning skills and home/school communication models. (B-7) The parties agreed to hire a mutually agreed upon consultant. The consultant chosen was Dr. Laura Seese, who is not an employee of the District. (Testimony of Director) The Parents' request for after-school tutoring was refused. (B-7) The justification for this refusal was that the study skill areas of concern were being addressed in the resource room. (Id.)

21. At the beginning of the 9th grade year, Student received 4.8 hours of academic support a week in the resource room and .8 hours a week of counseling. (B-7)

22. Student's progress on the Academic Goals and Objectives of his IEP, as noted on the 2/20/2012 Progress report, remained unchanged when the next Progress Report for IEP Goals and Objectives was issued on 6/20/2012. (B-12)

23. Student's progress on the Social/Behavioral Goals indicated regression on the goal of demonstrating an improvement in social skills. (B-12) Regression was also noted in the Objectives of responding in a socially acceptable manner when approached by peers and/or adults in a variety of structured and unstructured settings, communicating and interacting in a socially acceptable manner with peers and adults, with fading adult prompting. (Id.)

24. Student had two significant behavioral incidents at school in May, 2012. (Testimony of Father; B-10). The first incident involved the theft of a cell phone on or around May 3, 2012. The second incident involved Student defacing another student's planner with slurs and obscene pictures. (B-10) Student was moved to a Level 3 Accountability for the remainder of the school year which meant he had an escort for transitions between classrooms, to and from lunch and to the bus at the end of the day. (Testimony of Director; B-10)

25. A PPT meeting was held on 9/25/2012 during which Dr. Seese provided an oral report of her findings. (B-15) Despite the PPT agreeing to Dr. Seese serving as a consultant in February of 2012, this is the first time any information from Dr. Seese is obtained. (Testimony of Director)

26. The reason for the delay in receiving Dr. Seese's written report is unclear. The District stated it had hoped to review the report in April, but Dr. Seese had indicated that she needed more time to complete the work. (Testimony of Director) Dr. Seese may have been ill for an undetermined length of time.

(Testimony of Director) Despite attempts by the District to obtain the report over the summer, it was not produced until some time after the 9/25/2012 PPT meeting. (Testimony of Director) Dr. Seese failed to note the date on which she generated the written report on the report itself. (B-16)

27. At the 9/25/2012 PPT meeting, the Parents requested four hours of after-school tutoring a week to address difficulties with homework completion at home. (B-15) Dr. Seese expressed her opinion that in-school program options better than after school tutoring for addressing Student needs. (B-15) The PPT summary states that “[Student] needs to take ownership of his work and follow through” and then states immediately thereafter, that “[s]ome reinforcement at home tied into [homework] will be important as getting a poor grade does not seem to be of concern to him.” (Id.) Student’s inconsistent grades were noted in French and English. (Id.)

28. At the 9/25/2012 PPT meeting, the PPT predicted Student will attend a 4 year college as he is interested in engineering. (B-15)

29. The Board refused to have an independent evaluation conducted, but agreed to have a Functional Behavioral Analysis done by District staff at the 9/25/2012 PPT meeting. (B-15) The issues of afterschool tutoring and behavior support were tabled pending further discussion between the Attorney for the Board and Attorney for the Parent. (Id.)

30. One way in which Student’s disability was manifesting itself in the Behavioral/Social/Emotional sphere in 10th grade was in an inability to see connection between his behavior and immediate and long range consequences flowing from his inability to inhibit some behaviors and poor self-monitoring skills. (B-15)

31. Student’s 9/25/2012 IEP increased resource room support to 9.6 hours per week and included modified Goals and Objectives for Student’s Sophomore year. (B-15). Student’s Academic Goals were changed to [Student] will demonstrate the ability to self-monitor his performance against the expected standard and [Student] will demonstrate the ability to inhibit impulsive behaviors at appropriate times. (B-15)

32. Student’s Social/Behavioral Goals for his Sophomore year were changed to: [Student] will demonstrate the ability to apply strategies learned in counseling sessions to his daily academic and social routines, [Student] will develop the study skills and academic habits needed for success at the post-secondary level and [Student] will continue to develop and refine his transition plan in the area of employment and career goals and awareness. (B-15)

33. Student’s first semester grades as of April 23, 2013 were B in Theater, D+ in American Government, C in Geometry, C+ in Biology, B- in French and C in English. There were a noticeable number of absences from Study Hall, 21 in total, the reason for which was not made clear in the record. (B-20)

34. Student’s Progress on IEP Goals and Objectives was reported on April 23, 2013. (B-21) Satisfactory progress was reported on all IEP Goals and Objectives, with the exception of the mastery of one objective addressing handwriting and objectives relating to the Transition Goals that had not been introduced. (Id.)

35. On April 23, 2013, the PPT met to plan the Student's Triennial Evaluation and conduct an Annual Review. (B-22) The PPT Recommendations were to conduct an FBA with BIP to follow, set up iPads in classrooms, conduct an Assistive Technology evaluation, meet as PPT in one month, liaison with outside therapist, contact district network head, fade Teaching Assistant from classroom, excused absences for April 15 and April 16, liaison with Dr. Olive around the FBA, continue with current goals through to PPT meeting in June, 2013 and conduct a re-evaluation during the summer. (Id.)
36. Attorney for the Student requested an FBA leading to a BIP and requested that Integrated Support be moved to a one to one time to provide more tutorial support. (B-22) This was agreed to by the PPT. Consents for FBA and AT Evaluation were signed by Parent. Consultation between Dr. Olive and School Psychologist was requested and agreed to by District. (Id.)
37. There were no disciplinary referrals of Student to the Dean of Students at Joel Barlow from September 20, 2012 through April 23, 2013. (B-22)
38. Student receives tutoring in Algebra as a result of his score on a readiness test for this year. (Testimony of Case Manager)
39. The transition from the use of teaching assistants or paraprofessionals to 1 to 1 coaching model was carried forward from end of Sophomore year. (Testimony of Case Manager)
40. As of January 14, 2014, Student's grade in Chemistry had moved from a D+ in the first quarter to a C+ in the second quarter. Student's grade in Algebra 2A had moved from a C+ in the first quarter to a B+ in the second quarter. In Art, the Student went from a B+ to an F from the first quarter to the next. In US History, the Student earned a C- in both quarters. In AP English, the Student earned a D in both quarters and in French, Student earned a C in both quarters. (P-17)
41. The January 14, 2014 Powerschool report shows that the grades for individual homework assignments, tests and quizzes that make up the composite quarter grade varied dramatically. (P-17, Pg. 2). A review of Chemistry grades for the period from 11/4/2013 through 1/13/2014 shows the following spread of grades: A+ (11), B-(1), C (2), C-(2), D (3) and F (7). (Id.)
42. Student's Grade Point Average ("GPA") in Freshman year was 2.0 and 2.3 in Sophomore years. (Testimony of Director)
43. In 2007, Dr. Loomis completed a psychological evaluation of Student. (P-13) He recommended a contingency plan with careful tracking of behavior difficulties and to identify events triggering negative reactions. (P-13)
44. Student came to Parents with an IEP (Testimony of Father). When Student had behavioral issues in 6th grade in the Redding School district, the PPT utilized the services of a behaviorist through the Institute for Professional Practice ("IPP") to great success. (Testimony of Father) Components of Student's program in this year included weekly team meetings. (Testimony of Dr. Sellinger) The IPP behaviorist was replaced with in house staff in subsequent years and Student's behavior declined in 7th and 8th grades. (Id.)
45. Student was assigned a case manager for the 2011-2012 school year and 2012-2013 school years.

(Testimony of Director). Student's case manager was responsible for communicating with the general education teachers and with home. (Id. at 15) The case manager was also responsible for making sure the IEP was being implemented and working towards the goals and objectives in Student's IEP. (Id.)

46. District has provided Student with services of School Social Worker since 8th grade transition (Testimony, Director 1/14/2014 Pg. 25). The School Social Worker's charge was working on social emotional goals including improving decision making, accepting responsibility, strategies to manage anger. (Testimony of Director)

47. Behavioral issues continued to occur in 9th grade. (Testimony, Father) Student's difficulties in 9th grade eventually resulted in teaching assistants being assigned to Student in all of his academic classes in the 2011-2012 school year. (Testimony of Director) This expansion of in-class support was needed because student was not always representing the homework that needed to be done, nor was he presenting homework that should have been completed accurately which made the case-manager's monitoring very difficult. (Id.) Teaching Assistants were tasked with the job of recording Student's assignments and recording and tracking completion of assignments (Testimony of Director)

48. Student was resistant and disrespectful in interactions with paraprofessionals in his 9th grade year. Student had a history of this behavior. (Testimony of Director, B-7)

49. Student and family have had the involvement of outside agencies including Intensive In-Home Child and Adolescent Psychiatric Services on two occasions (IICAPS). (Testimony of Father, Director)

50. The Region 9 School Psychologist conducted a Functional Behavioral Assessment ("FBA") which was completed on June 7, 2013. (B-6) This FBA identified behaviors of concern as "Incidents of escalated behavior in the classroom and missed homework assignments." (Id.) The Operational Definition of Targeted Interfering Behavior was noted as: "[Student] occasionally engages in behavior that is inappropriate for the classroom environment. Examples of these behaviors include verbal argument and refusing to work on missed homework assignments." (B-26)

51. Student does not have a learning disability. (Testimony of Dr. Olive, P-13)

52. District Staff conducted an Assistive Technology ("AT") Assessment and generated a report on May 21, 2013. (B-24) The assessment indicated that Student would benefit from the use of technology with writing tasks. (Id.)

53. Parents have concerns about Student using the internet unsupervised. (Testimony of Father) This stems from misconduct on the part of Student and more significantly, from Student's biological family utilizing the internet to find Student through information Student had posted online and come to Student's summer job. (Id.) This contact had a deleterious effect on Student's behavior. (Id.)

54. There was an incident at Joel Barlow High School where Student was missing from his classes for a significant portion of the school day and when finally found, was discovered working on a computer unsupervised. (Testimony of Father)

55. The Progress Report for IEP Goals and Objectives dated 6/13/2013 indicated Satisfactory progress on Student's Academic Goals and Social Behavioral Goals. (B-27) Limited progress was noted on the

objective of training Student in a self-regulatory strategy...[Student] will keep a daily journal in which he predicts how effectively he will accomplish a task., his predicted level of success, and his actual level of performance in relation to his predictions. (Id.)

56. A PPT was held on June 13, 2013. (B-28) Parents believed Dr. Olive would be in attendance to review School Psychologist's FBA. (Id.) Board indicated there was a consultation with Dr. Olive prior to conducting the FBA, and that Dr. Olive's forms were used. (Id.) Teacher reports Student in not being invested in his own grade. (Id.) Family through counsel requested an independent FBA and this action was refused. (Id.)

57. A Transition Report dated June 12, 2013 has been completed by the District Transition Coordinator. (B-28) Transition concerns noted in the report included college and career readiness skills and making connections between choices at the high school level and the impact on successful college and workplace experiences. (Id.) Transition goals to address concerns included acquiring skills to successfully transition student to college and increase his understanding of the value of work, and working on appropriate behavior expectations in the workplace. (Id.)

58. Dr. Olive was retained by the District, in her capacity as a Board Certified Behavioral Analyst (BCBA) and conducted an "Observation, Program Review and Recommendations" for Student. (Testimony of Director, P-2) A written report was generated on April 18, 2013. Dr. Olive noted a discrepancy between Student's academic performance and his tested ability and identified three possible explanations for that discrepancy. (Testimony of Dr. Olive, P-2) Dr. Olive identified deficits in the written goals including an unclear relationship between the goals and the objectives, and lack of clarity in definitions utilized in goals. (Id.) Dr. Olive also indicated that goals and objectives that rely on adult actions as triggers for behavior, do not foster independence. (Id.)

59. Dr. Olive's recommendations include explicit skill instruction in the areas where skills are lacking, Assistive Technology, revision of IEP Goals and Objectives to be more measurable, a thorough FBA to determine if school failure is motivated by external reinforcers or if it is due to executive functioning and/or disability related conditions and collaboration between home school and the community. (P-2) Dr. Olive also included a list of identified skills that Student appeared to be lacking. (Id.) This extensive list included Student's ability to submit all work on time. (Id.) Student's inappropriate behaviors, as identified by Dr. Olive in her report, were lying, bringing inappropriate items to school, and opening up social media accounts without permission. (Id.)

60. Dr. Olive indicated that Student should be college bound but expressed concerns about college readiness if Student's behaviors were not addressed. (Testimony of Dr. Olive)

61. Student's general cognitive ability is within the average range, with a Full Scale Intelligence Quotient of 109. (P-4) Student's verbal reasoning abilities are in the superior range as evidenced by Verbal Comprehension Index of 120. (Id.) Student's perceptual reasoning on the Perceptual Reasoning index is in the average range. (Id.) Working memory for Student is a weakness in comparison to his verbal reasoning abilities. In working memory, he is in the average range scoring a 97 on the Working Memory index which means he did better than 42% of his peers. (Id.) Student's performance on the Processing Speed Index was 97, or average speed. Inconsistencies were seen in Student's visual and auditory memory skills during testing. (Id.)

62. Father reports that struggles with Student surrounding completion of homework continued throughout Student's first two years of high school. (Testimony of Father)
63. Student seeks independence through his behaviors, but does not know how to do it independently. (Testimony of Dr. Sellinger)
64. Although a document was appended to the IEP dated 5/13/2011, a BIP, there was no BIP noted in the IEP dated 9/15/2012. (B-1, B-15)

CONCLUSIONS OF LAW AND DISCUSSION:

The Student is eligible under the Individuals with Disabilities Education Act ("IDEA") to receive a Free Appropriate Public Education in the Least Restrictive Environment. 34 CFR 300.17. The parties do not dispute that the Student is eligible for Special Education under the OHI-ADHD classification found in 34 CFR 300.8(9).

Parents assert that the Individualized Education Programs ("IEP") designed and implemented for the Student in the 2011-2012 and 2012-2013 school years were inappropriate. Board disagrees. The determination of what is an appropriate education for a student with a disability requires an analysis of each student's unique needs and must be determined on a case-by-case basis. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

Board has the burden of showing its program for this Student is appropriate. Conn. Agencies Regs. § 10-76h-14. In order to meet this burden, the Board must demonstrate compliance with the procedures set forth in the IDEA and show that the IEP is reasonably calculated to enable the child to receive educational benefits *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). If the Board can successfully demonstrate that it has met the two-part *Rowley* test, it has met its burden and nothing further is required. (Id.)

The parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision when determining the adequacy of an IEP. *See Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1039 40 (3d Cir. 1993) ("*Rowley* requires, at the time the initial evaluation is undertaken, an IEP need only be 'reasonably calculated to enable the child to receive educational benefits.' ... [T]he measure and adequacy of the IEP can only be determined as of the time it is offered to the student, not at some later date." (*quoting Rowley*, 458 U.S. at 206-07)). A significant amount of evidence produced at the hearing addressed Student's 2013-2014 IEP and functioning within the current school year. While the appropriateness of the 2013-2014 program is not at issue in this hearing, this Hearing Officer declines to find that a reasonable inference should be drawn that the Parents consider Student's 2013-2014 program to be appropriate, solely on the basis that Parent did not request to amend the Hearing Request to include the current year. No information beyond the fact that an amended complaint was not filed was noted in support of Board's argument that the inference be drawn. Many reasonable inferences could be drawn from that one fact, including an inference that the Parents, by filing in June, might have reasonably expected the alleged problems to have been addressed before April 2014. Thus, this Hearing Officer finds that there is an insufficient basis for that inference.

The question before this hearing officer is whether the Board's program adequately addresses Student's needs under the *Rowley* standard: was Student's IEP for the 2011-2012 and 2012-2013 school years reasonably calculated to enable the child to receive an educational benefit? Student's program, while it had helpful components, failed to provide a program that addressed the ongoing issue of Student's inability to generalize critical skills to home, namely completing assignments outside of

school and turning them in. Despite reports of the success of earlier programs that involved a behaviorist, the Board declined to utilize one for the 2011-2012 and 2012-2013 school years. As this Student is of average intelligence and academic ability, the educational benefit analysis turns on whether the Student is able to successfully access the curriculum and complete work consistent with the expectations set forth by school staff. Student clearly does not complete work or hand it in consistently, nor does he complete it with consistent quality commensurate with his abilities, despite a significant level of support.

The Board has suggested that the Parents' true concern is raising Student's grades and there exists a dispute as to whether Parents were told that they could reasonably expect B grades from Student. Regardless of whether this dispute stems from a miscommunication or misunderstanding, it does not bear on the issues at hand. The Parents are not requesting that Student gets all Bs. Parents are trying, in the waning moments of their son's high school career, to determine the source of the behaviors which interfere with his educational progress and address them, before the opportunity to obtain that information and act on it is lost.

The Board's representation that the increase in Student's GPA from 9th grade to 10th grade is evidence of progress is compromised by the inconsistency of Student's work as a whole within each class. The Director testified that Student's GPA of 2.0 in his Freshman year "would be a straight C average" and that the 2.3 Student earned at the end of his Sophomore year is "C-pluses and some B-s." An analysis of how Student's daily work in each class results in a quarterly grade of a C or B- is critical to understanding why a slight rise in GPA may not be an accurate assessment of progress for this Student.

In the current year, Student is achieving a C or D quarterly grade by producing a significant amount of A and B level work riddled by Ds and Fs. In other words, his grade is dragged down to a C or D, frequently by the lack of work completion or complete failure on assignments or tests. Thus, while the Student may have received an overall C in a class, that grade may not accurately reflect the rollercoaster that is this Student's academic achievement.

In the context of this hearing, Student has been described as "inconsistently consistent", in a manner that suggests that is just the way he is, and that is the end of the inquiry. Although the District in questioning its witnesses attempted to characterize Student's interfering behaviors (lying and failing to turn in homework assignments) as typical of high school students, Student, by virtue of his disability and history of trauma is atypical and his needs are complex.

The Board's Progress Reports on IEP Goals and Objectives for Student's first two years of high school consistently indicated satisfactory progress on many of Student's IEP Goals and Objectives. However the evidence indicates periods of significant regression within the first two years of high school requiring significant changes to the program midstream.

Student's IQ and Achievement testing indicate that Student is of average intelligence and has average, and in some case superior, academic abilities. Student does not have a learning disability. Unfortunately, Student has still not internalized the skills necessary to succeed in a post-secondary educational or work setting. Throughout his first two years of high-school he continued to struggle to complete work outside of classes and prepare for tests within it. In order to avoid Student starting college with skill deficits that cast serious doubt on his ability to independently and successfully navigate a higher education environment, a multi-prong approach must be instituted.

Student's intelligence and academic achievement testing indicate that college should be an option for Student. The District changed the Student's post-secondary transition goal from a 2 year, 4 year, or vocational school to a four year college, based on his interest in engineering. Board and Parent witnesses testified that Student's innate abilities should make college an option for him. Witnesses also

testified that Student is not ready for college. While organizational weaknesses exist and contribute to Student's difficulties, the evidence shows that what impedes the student most is his behavior. Student has been struggling with homework completion and test preparation for years.

The marked disparity between ability and achievement and the observations made by District Staff that the Student is not making the connection between his choices and the impact of those choices on his future indicate that this Student is not being given the tools he needs to successfully transition to the post-secondary educational setting set forth in the District's IEP. Student is not college ready and without intervention is not on a trajectory to obtain the skills he lacks and are necessary to succeed in a four-year college.

The Transition Coordinator made a recommendation that Student be allowed to experience the natural consequences of his actions. While Student's chronological age and grade level might appear to warrant this recommendation, even the most cursory review of Student's childhood reveals that his childhood was marred by horrific instances of unnatural consequences. These childhood experiences and their impact are being addressed in school by the School Social Worker and outside of school by Student's therapist. The work being done by the School Social Worker has its own pace and focus and is clearly a very important component of Student's IEP.

The task of getting Student to an understanding of the relationship between his actions and his future at a fundamental level may well be addressed in the therapeutic setting. It may also be addressed through an FBA and BIP by creating opportunities for success on a smaller, more concrete scale. While there may be some overlap in terms of goals, that therapeutic work is not mutually exclusive with the work in an ABA program. These are complementary processes and should be coordinated to the best effect for the Student.

Despite reports of the success of earlier programs that involved a behaviorist, the Board declined to utilize one for the 2011-2012 and 2012-2013 school years. As this Student is of average intelligence and academic ability, the educational benefit analysis turns on whether the Student is able to successfully access the curriculum and complete work consistent with the expectations set forth by school staff. Student clearly does not complete work or hand it in consistently, nor does he complete it with consistent quality commensurate with his abilities, despite a significant level of support.

The Functional Behavioral Assessment conducted by the district did not assess the issue of Student's continued failure to complete assignments and turn them in nor did it address Student's ongoing struggle to generalize skills to the home environment and the maladaptive behavior of lying within the school environment. The singular focus of the Board's FBA limited the ability to fully evaluate the Student's interfering behaviors, and thereby allow those behaviors to be addressed.

Demonstration that a procedural violation has occurred does not in and of itself entitle parents to prevail. It must be shown that the procedural violations "impeded the child's right to a [FAPE]," "significantly impeded the parents' opportunity to participate in the decision-making process," or "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *A.C.*, 553 F.3d at 172. Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not. See *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005).

In the present case, the issues of the continuum of appropriate placement and appropriateness of the IEPs in place at the start of each school year are, in essence, elements of the substantive denial of FAPE claims and as such are addressed in the substantive analysis. The remaining procedural violations raised by the Parents did not occur. Thus it is not necessary to evaluate whether there was a denial of FAPE as a result. The Board did not violate Student's Procedural Safeguards by failing to conduct a Functional Behavioral Assessment. While the parties disagreed about who should conduct the FBA, one

was conducted by the School Psychologist and the Board retained an outside consultant to review the Student's file, conduct observations and generate a report.

The Board did not violate Student's Procedural Safeguards by failing to complete an evaluation in a timely manner. The record reflects that the failure to provide a timely report was the fault of the independent professional contracted to make the report, not the Board. The Board made good faith efforts to obtain the report earlier than the time it was produced, but those efforts were unsuccessful.

The Board did not violate Student's Procedural Safeguards by failing to consider the use of Assistive Technology in Student's program. Technology was offered to and utilized by the Student in his educational program, within the confines imposed by Parents out of fear for Student's safety.

FINAL DECISION AND ORDER:

The Board failed to provide Student with a Free Appropriate Public Education in the Least Restrictive Environment for the 2011-2012 and 2012-2013 school years. The issues of a failure to maintain a continuum of appropriate placements and failure to have appropriate IEPs in place by the first day of the 2011-2012 and 2012-2013 school years are subsumed under the finding of a denial of FAPE. The Board did not violate Student's Procedural Safeguards by failing to conduct a Functional Behavioral Assessment. The Board did not violate Student's Procedural Safeguards by failing to complete an evaluation in a timely manner. The Board did not violate Student's Procedural Safeguards by failing to consider the use of Assistive Technology in Student's program.

The Board shall immediately engage the services of the Institute for Professional Practice ("IPP") In the event that IPP cannot or will not accept the referral, the Board shall immediately engage the services of another outside organization that employs staff with education and training comparable to IPP staff. Any alternative outside organization retained shall have at least one BCBA in its employ, who will serve as consultant to Region 9. IPP, or its equivalent, shall be retained for the purposes of having a BCBA consult with the Region 9 Planning and Placement Team and Staff responsible for creating and implementing Student's IEP. In the event that IPP is not available, the alternative outside organization shall be determined by the PPT. The BCBA will review the FBA conducted by the Region 9 School Psychologist and any data that was collected in preparation for the FBA. The BCBA shall make recommendations regarding whether the FBA can and should be modified or an additional FBA is necessary to address the specific issues of Student failing to complete homework, failure to turn in homework, and failing tests and exams. The BCBA shall also make recommendations regarding the design and implementation of a BIP for Student. The BCBA shall take no more than 10 hours to review the District's FBA (including the documentation and data relied upon for the District's FBA) and develop recommendations for the design and implementation of a BIP. In the event the BCBA recommends another FBA be conducted after his or her review, the second FBA may be conducted by District Staff (determined by the PPT) under the supervision of the BCBA. The BCBA shall also monitor the implementation of the BIP. If the BCBA feels that team meetings with family and school staff are necessary, the Board shall facilitate those meetings by making space and staff available upon reasonable request. The BCBA shall train District staff, as needed, to assist in the implementation of Student's BIP. The Board shall contract with IPP, or its equivalent, to have the BCBA conduct the initial 10 hour review and provide two hours a week of consultative services during the academic year. The BCBA shall use these two hours to consult with staff, train staff, meet with family, supervise an additional FBA, if another is deemed necessary by the BCBA, and monitor development and implementation of the BIP. The BCBA shall have discretion to determine how much time she shall apply to each of the tasks above during her two hours per week. The BCBA shall also have the discretion to change the two hour schedule as needed, and may provide more hours in one week and less

than two hours in another week, although the total number of hours of services for the remainder of the 2013-2014 school year and the 2014-2015 school year shall not be increased as a result. For example if the BCBA wishes to schedule a 3 hour training he or she may provide 3 hours of training in one week and then only provide one hour of consultation the following week.

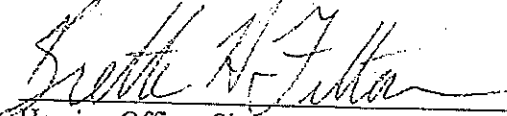
The Board shall contract with IPP, or its equivalent, to have the BCBA participate at the annual review PPT meeting (currently scheduled for June 12, 2014) and the annual review PPT meeting in 2015 (whenever that is scheduled). The Board shall be financially responsible for the costs of the BCBA attending those meetings and attending any additional PPT meetings held during the 2014-2015 school year. The services of the BCBA shall be in place through Student's graduation, but shall not be required during the Summer of 2014.

**COMMENTS ON THE CONDUCT OF THE HEARING, PURSUANT TO
R.C.S.A. §10-76h-16(b):**

Attorney for the Board and Attorney for the Student conducted themselves with the utmost civility and professionalism throughout this hearing. They are both to be commended for advocating zealously on behalf of their clients, without losing sight of the fact that regardless of the outcome of the hearing, the family and school staff will need to work together for the remainder of Student's time in the Region 9 School District.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).


Hearing Officer Signature

Brette H. Fitton
Hearing Officer Name in Print