

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

New Britain Board of Education v. Student

Appearing on behalf of the Parent:

Attorney Lawrence Berliner  
Law Offices of Lawrence W. Berliner, LLC  
1720 Post Road East, Suite. 214E  
Westport, CT 06880

Appearing on behalf of the Board:

Attorney Leander Dolphin  
Shipman & Goodwin, LLP  
One Constitution Plaza  
Hartford, CT 06103

Appearing before:

Justino Rosado, Esq.  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Was the program provided by the Board for the 2013-2014 school year appropriate and did it provide the Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?
2. Was the program provided by the Board for the 2014-2015 school year appropriate and did it provide the Student with FAPE in the LRE?
3. Is the program offered by the Board for the 2015-2016 school year appropriate and does it provide the Student with FAPE in the LRE?
4. Is the Student entitled to compensatory education for the denial of FAPE?

**JURISDICTION:**

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

**SUMMARY:**

The Student has been identified with Autism and is entitled to receive FAPE as defined in the Individuals With Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a et seq. At a planning and placement team (PPT) meeting, the Parents were of the opinion that the program offered for the 2014-2015 school year did not provide FAPE. The Board disagreed with the Parents and the Parents filed for due process. The parties attended a resolution meeting on April 24, 2015 but a resolution was not attained.

**PROCEDURAL HISTORY:**

An impartial hearing officer was appointed on April 14, 2015; a pre-hearing conference was held on June 1, 2015. Hearing dates of July 27 and 28, 2015; August 27 and 31, 2015; September 8 and 30, 2015; October 6 and 7, 2015; November 12, 17 and 30, 2015 were chosen by the parties. The July 28, 2015 and September 30, 2015 hearing date were cancelled by the parties. The Board presented Exhibits 1 thru 52. B-47 and 48 were marked for identification only; B-47 and B-52 were excluded as exhibits. All other Board exhibits were full exhibits of the hearing. Parents presented Exhibits 1 through 37. Parents' Exhibits<sup>1</sup> 6, 9, 13 and 27-33 were excluded as exhibits of the hearing. Parents' Exhibit No. 13 was completed after the initial request for hearing in April, 2015, and was not provided to the District until July, 2015. The report was reviewed by the PPT on August 20, 2015, and will only be considered with respect to the 2015-16 school year. On August 31, 2015, the parties agreed to amend the due process request and include the following issues: Is the program offered by the Board for the 2015-2016 school year appropriate and does it provide the Student with FAPE in the LRE?

The Board filed a motion to join Department of Developmental Services (DDS) as a party to the Due Process hearing. Following the submission of various motions and oral argument, on July 27, 2015, the Hearing Officer granted the Parents' and DDS' motion to dismiss the Board's motion to include them as a party to the administrative proceeding.

The Parents' attorney presented seven witnesses: the Parents; Brian Liu (Evergreen Center); Dr. Aguayo (Psychiatrist); Dr. Powers (Psychologist); Dr. Molteni (Psychologist); and Dr. Carabillo (Director of Pupil Services). The Board called five witnesses: Dr. Loss (Psychologist); Elizabeth Healey (Special Education Teacher); Mary Daly (SLP-CCC); Susan Douville (BCBA) and Dr. Carabillo (Director of Pupil Services).

A motion was filed by the Parents' attorney requesting that a witness be allowed to testify by telephone. There was no objection by the Board and a protocol was established in order for the witness to testify. Hearing Officer's Exhibit<sup>2</sup> No. An affidavit was received from the Notary Public who administered the oath. (H.O. 4) The parties were given copies of the affidavit.

At the conclusion of the evidentiary portion of the hearing, a briefing schedule was discussed and the parties agreed to file simultaneous post trial briefs on January 20, 2016. The briefs were timely filed by both parties after an extension of time to file the briefs was requested and the extension was granted. The parties were instructed that any factual references and arguments presented in the briefs had to have a factual basis of prior evidence presented during the course of the hearing.

This Final Decision and Order set forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they

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<sup>1</sup> Hereafter Parents' Exhibits will be noted as "P" followed by the number of the exhibit.

<sup>2</sup> Hereafter Hearing Officer's Exhibits will be noted as "H.O." followed by the number of the exhibit.

should be so considered and vice versa. SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and Bonnie Ann F.v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

The date for the mailing of the Final Decision and Order was extended to accommodate the hearing date and the briefing schedule. The date for mailing the Final Decision and Order is February April 22, 2016.

**FINDINGS OF FACT:**

1. The Student is diagnosed with Autism and eligible to receive special education and related services as defined in the Individuals with Disabilities Educational Improvement Act (“IDEA”) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. (Board’s Exhibit<sup>3</sup> No. 26).
2. The Student has also been diagnosed with an Intellectual Disability, Impulse Control Disorder, Conduct Disorder, Anxiety Disorder, Insomnia, and Stereotypic Movement Disorder with Self-Injury. (B-3).
3. The Student is severely cognitively delayed, with his full-scale IQ score ranging between 34 and 39. The severity of his autism and maladaptive behaviors impede the acquisition of new skills. The Student is primarily non-verbal. (B-20, B-23, Testimony of Speech and Language Therapist)
4. The Student attends the River Street Autism Program at Coltsville, a state approved program that operates year round, providing 240 days of consistent staffing and educational programming five days/week, and includes extended day services until 4:00 p.m. each day. (P-21)
5. The Department of Developmental Services (“DDS”) contracts with Marrakech to provide 40 hours of in-home support to the Parents in the evenings and on weekends. In April 2015, for a period of 30 days, DDS also provided 24-hours/day of round-the-clock in-home support at the Mother’s house. (B-2, B-3, B-13, Testimony of Father).
6. The Student currently lives at home with his mother, sister and maternal grandmother. The grandmother assists with the Student’s care and is the primary care giver in the home. Parents are divorced and share custody. The student stays with his father on Friday and returns Monday morning. (Testimony of Mother)
7. The Student has always been enrolled in the Board’s school. In June 2008, the Student started attending Capital Region Education Council (CREC). The Student began to demonstrate aggression during summer recess. The Mother requested extended school year services in 2010 and the Board complied. (Testimony of Mother)

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<sup>3</sup> Hereafter Board’s Exhibits will be noted as “B” followed by the number of the exhibit.

8. In January 2008, a psychological evaluation was performed of the Student. The evaluator recommended a full day educational program with the support of a one to one aide. It was recommended that the program be an extended school year program with 225-230 day with a Board Certified Behavioral Analysis (BCBA). The evaluator recommended that the Parents participate in monthly team meetings. Parent training should be included in the Student's Individualized Education Program (IEP) to facilitate consistency across settings. Visual supports should be used extensively to assist the Student in his participation in activities. Behavior was a concern but not an issue. Dr. Powers recommended that the Student attend the CREC, Coltsville program. (B-41, Testimony of Dr. Michael Powers)
9. At a PPT meeting in 2010, the Student's program was changed. The Student's school day was extended from eight am to four pm. The extended school year remained the same. (Testimony of Mother)
10. In the 2011 triennial behavioral summary it was noted that data collection for elopement was discontinued in 2009 as it was not observed to be an unsafe behavior. In 2010 the behavior was observed to have changed, as the Student was now running away from an adult. Data collection of this behavior was reestablished. With the introduction of a verbal reprimand in 2011, elopement behavior decreased. (P-17)
11. During the 2008, 2009 and until March 2010, the Student was using pull-ups during the school day. In March 2010 pull-ups were discontinued during the school day and the Student began to use underwear. He was being tripped to the bathroom every two hours with small edibles as a prompt and a larger reinforcer for spontaneous initiations. The Student was initiating the bathroom approximately once every two weeks. (P-17)
12. On April 4, 2011, the Student was evaluated by the school psychologist. Based on the evaluation, the evaluator found that the Student:
  - a. Continued to benefit from a self-contained special education program with a one to one ABA Program.
  - b. Continue to require a Behavioral Intervention Plan (BIP) to address aggression, head banging, throwing and grounding behavior.
  - c. Continued to benefit from frequent repetition within a discrete trial fashion in order to master new material.
  - d. Continues to need help in dressing skills, training within the school environment for using the bathroom. At home he continues to wear pull-ups.
  - e. Required generalization of all skills learned need to be programmed for in all environments with regards to activities of daily living, academic skills, and areas of socialization.(P-17 pgs. 7-8)
13. During the 2012-2013 school year, the Student had mastered several of academic objectives, including his math objective and his objectives targeting sorting and matching skills. He also made progress on his self-help skills of dressing and meal preparation and on his socialization objectives, which targeted, among other skills, turn-taking. He was

able to make at least 4 exchanges of the iPad with a peer, made satisfactory progress or mastered all but one of his communication objectives, and similarly made satisfactory progress or mastered all but one of his behavior goals/objectives. (B-29, Testimony of Special Education Teacher).

14. The Student would not allow a dentist to touch him. A basic dental desensitization program was put in place to facilitate tolerance of basic dental equipment. In May 2013, this program was put on hold when the Student chipped his front tooth during the weekend, while under Marrakech care. The program was resumed in August 2013. The program was modified to avoid his chipped tooth. The Student's aggression, head hitting and tantrum behaviors escalated after this incident. The Student showed tolerance for the medical equipment when administered by the school nurse. (B-22, B-31)
15. In January 2012 a toileting program was implemented using cue cards. This was modified in July 2013 by utilizing designated trip times to the bathroom during the school day. In January 2014 the trip time was eliminated from the schedule to encourage the Student to independently request to go to the bathroom. A bathroom reminder was placed at the Student's workstation and another in his Picture Exchange Communication System (PECS) book. The instructor reads the reminder at the designated trip time and provides a delay for the Student to respond. (B-22)
16. During the 2013-2014 school year, the toileting program continued to be implemented. The main focus of the program was bathroom initiation. The Student was wearing underwear during the school day and successfully producing urine on the toilet on the average of 1.5 times per day. Toilet incidents in school remained at near zero level. The Student had three incidents during the school year and these were attributed to illness. The Student uses pampers for his transportation home. (B-22, Testimony of School BCBA)
17. On September 17, 2013, Marrakesh, the DDS contracted provider of in-home services to the Student, provided a progress review of the Student. Every hour and a half the provider would prompt the Student to utilize the bathroom. At first the Student was non-compliant. The Student, with prompting, would pull down his pants independently. Starting in August, 2013, the Student would occasionally urinate in the toilet at the Marrakesh Island Lane site. The Student would indicate his wants or needs by tapping the staff on the shoulder. He sometimes verbalizes what he wants by using one word when he is given a choice between two to three items. (B-33)
18. On September 17, 2013, the Board convened a PPT meeting. The Board reviewed various reports. The PPT recommended the continuation of the CREC extended day program of forty (40) hours per week. The Parents presented their concerns with the CREC program and placement and reported that the program has not helped the Student. The Parents reported that they were pleased with Marrakech, the DDS funded private provider of home services. (B-26)

19. The Father requested placement at CCCD in Milford. The Mother did not request this change. A review of the program in Milford showed a decrease in the number of school days and the Mother was not in agreement with a reduction. (Testimony of Chief Academic Officer )
20. The Student's 2013-2014 Annual Behavior Summary showed he mastered two objectives of the five objectives of the Goal to increase appropriate behaviors and made slow progress in the other three objectives. In his Goal to decrease maladaptive behaviors, he mastered one objective and made slow progress in the other two. (B-15)
21. The Student's monthly average behaviors showed a decrease in four of the five targeted behaviors. The Property Destruction targeted behavior showed a slight increase of .1 for the 2013-2014 school year. Head banging decreased on a monthly average by 48.1. (B-15)
22. The Student mastered three of his independent living skills goal and made progress in the other three objectives during the 2013- 2014 school year. The Student requires redirection to complete functional routines. He requires extra time to complete motor tasks engaging or separating a zipper or fastening shirt buttons. (B-17)
23. The Student's Triennial Behavioral Summary for the 2013-2014 school year showed that his aggression and head hitting continued to be high at the beginning of the school year. This was attributed to the chipped tooth incident of May 2013. As the year progressed these behavior incidents decreased. (B-22)
24. In the March, 2014 triennial, maladaptive behavior, though variable on a shorter-term basis, were overall at lower levels over the past three years. Daily occurrences of grounding and elopement were low (elopement behavior had decreased since 2011). In addition, property destruction had decreased, as had tantrum behavior. (B-22, Testimony of BCBA).
25. The Mother stated that she was not provided with training in the home. The Mother also complained that the Student was not able to generalize skills learned at CREC in the home. The school offered to come to the home once a month and would provide Parent training. (Testimony of Mother)
26. The Student's school routinely offers 1 to 2 complimentary parent trainings a year, on topics such as PECS communication training and self-care/self-help training. Ongoing parent training has also been offered to the Parents through the Student's school's clinical reviews which are held approximately every 6 weeks and are run by the clinical director. ((Testimony BCBA)
27. In 2014, the Mother had the Student reevaluated by Dr. Michael Powers who had previously evaluated him in 2008. (See Findings of Fact No. 8) The evaluator did not observe the Student in the school because the reports he had received from the school were consistent and comprehensive. He trusted the school's evaluators. The evaluator did

not test for generalization because the Student was not capable of generalizing across varied settings. The Student is capable of generalization under tightly controlled and similar circumstances. The Student needs consistency in his program. (Testimony of Dr. Michael Powers)

28. The reevaluations showed that the Student's non-verbal cognitive was in the 2 1/2 to 5 year level and his verbal abilities were below the 2 1/2 age equivalent. The Student's day to day skill sets were between the 6 month to 2 1/2 year level. The Student's comprehensive and intensive program included 40 hours per week of educational services and 40 hours per week of home and community services provided through DDS. Despite this level of care the Student made minimal progress. (Testimony Dr. Michael Powers, B-3)
29. The Student's BIP needs to be adjusted continuously. The evaluator was not aware if any adjustments were done to the BIP. The Student's special education teacher reported that his academic skills, including matching, simple expressive identification, one-to-one correspondence, and following simple one-step directions must be addressed consistently or he will regress. (B-3)
30. Dr. Michael Powers did not observe the Student in his school setting because the school's evaluators were trustworthy. He did not ask the Student's teachers to conduct the teachers' report for the Vineland Adaptive Behavior Scales II because they had completed one seven months prior for the Student's triennial evaluation. The Parents were the informants for the Vineland Adaptive Behavior Scales II. Dr. Powers had recommended the school the Student currently attends, when he evaluated the Student in 2008. (Testimony of Dr. Michael Powers, B-3)
31. Dr. Powers' recommendation is a specialized residential therapeutic educational placement for the Student, targeting an intensive toileting protocol, a functional communications program and instructions in basic adaptive living skills. The Student's current toileting program does not address night time toileting. There is a concern about the Student's reaction to his removal from the community. The evaluator concurred with the PPT's recommendation that the Student be seen for an Alternative Augmentative Communication (AAC) evaluation. The Doctor does not expect the Student to be able to live independently; the issue is the level of support the Student will require. (Testimony of Dr. Michael Powers P-3)
32. On November 18, 2014, the Student was hospitalized by his Parents for aggression and self injurious behavior. The Bradley Hospital team's discharge summary recommended residential placement for the Student as outlined in Dr. Michael Powers' November 2014 evaluation. (B-12)
33. Bradley Hospital referred the Student to Dr. Patricia Aguayo, a Psychiatrist, for a follow up after his discharge. Dr. Aguayo received background information only from the Parents, Dr. Powers' November 21, 2014 letter, and a discharge summary from Bradley Hospital. Dr. Aguayo recommended a residential placement for the Student in order to

make progress and have consistency throughout the day. The doctor was not aware what school the Student attended nor did she attempt to contact the school in order to obtain information about the Student's program. The Parents had given permission for the doctor to contact the school. The doctor is not sure that the Student will make educational progress in a residential placement nor did she have knowledge of the recommended placement by Dr. Powers. (Testimony of Dr. Patricia Aguayo, B-4)

34. Dr. Aguayo did not consult with school personnel, did not observe the Student in his school setting and did not observe his separate home environments to consider whether consistency may be achieved. (Testimony of Chief Academic Officer )
35. On September 15, 2014, the Board held a PPT to conduct an annual review. The Parents agreed with the goals that were offered but were of the opinion that the Student required more. The Board added additional speech goals to the Student's IEP. The Parents felt that the Student needed more consistency between the home and school environments in order to make progress. The Parents reported that the Student was not able to generalize between the school and home. The Parents requested a therapeutic placement. This request was denied. The school offered to provide monthly visits to the home and continue monthly meetings as part of the Parent training to review strategies that are effective for consistency and purpose. (Testimony of Mother, B-13)
36. The clinical review team meets and observes the Student and reviews his program. The Father attended one clinical review session during the 2014-2015 school year; the Mother did not attend any sessions. The home visits offered by the Board did not occur due to the hospitalization of the Student for unsafe behavior in the home. (Testimony of BCBA, Testimony of Father)
37. The Student had made progress during the 2014-2015 school year. There is a room to teach the Student activities of daily living (ADL) which has a bed and dresser. The room is utilized to teach the Student how to dress himself, make a bed, hang shirts and put away laundry. By putting away the laundry, the Student also learns sorting skills. He makes the bed and takes clothes from the laundry basket, sorts them and puts them in a drawer. The Student can put on shirt, pants and shoes with modifications. He has a problem putting on a shirt correctly. (Testimony of Special Education Teacher)
38. The Student's behaviors of aggression, head-hitting, and property destruction all decreased in the 2014-2015 school year, as evidenced by his mastery of objectives targeting decrease of maladaptive behavior. He mastered 6/10 behavior objectives, and made progress on 3/10 objectives. His aggression decreased to a weekly-daily average of 8 or less occurrences for 3 out of 4 weeks per month, for 2 out of 3 months. His monthly mean for aggression was well below 8 instances per month, except for June, 2015 when he experienced a spike. The Student also decreased his head-hitting to a weekly-daily average of 35 or less incidents; over the course of the 2014-2015 school year, head-hitting was under 20 incidents, with only one month above 35. (P-22, Testimony of BCBA)



39. The Board offered revised behavior goals and objectives for the 2014-2015 school year. The BCBA recommended close contact with Parents and outside agencies providing services to the Student to aid in generalization and to ensure that all of his needs were met in school and outside of school. (P-22, Testimony of BCBA)
40. The Mother did not attend all the meetings at CREC because they were not helpful. What was shown at the meetings are not practical for the Student. The Student can sometimes follow one step directions. The district offered to provide BCBA assistance. The Parent already had a BCBA help in the home but it was not helpful. (Testimony of Mother)
41. The mother or the grandmother dresses the Student for school. They pick him up at the bus stop. The grandmother's primary language is Polish; she speaks a few words in English. She is the primary caregiver for the Student. (Testimony of Mother)
42. The Student's school's PECS book was offered to the Home Specialist Therapist from BBS so that the same book that is utilized in school is used at home. The Home Specialist contacted the Speech and Language Therapist to find out the strategies utilized in school so they could be replicated at home. (Testimony of Speech and Language Therapist)
43. The Parents' proposed therapeutic residential placement is Evergreen Center in Massachusetts. The program is a highly structured residential program that would implement the Student's IEP. The normal class size is 5-8 students. The Student was interviewed for placement at Evergreen Center when he was hospitalized at Hampstead Hospital by his mother. There would be no openings for placement until January 2016. (Testimony of Brian Liu-Constant)
44. The Student, if placed, would be in the Behavioral Development Program of the Northeast Unit which is geared toward the clinical needs of the Student. This is the most extensive unit. It is for students who have behavior issues and are self-injurious. The Student would be provided with one on one services by a faculty member for 14 hours of his first 30-45 days. He would also have a one on one staff member overnight due to the Student's sleep regulation issue. Evergreen provides toileting skills training with the *Foxx and Azrin* program model, providing adaptive daily living skill training in the residence. The Student would be living with seven other students who are between 14 and 21 years of age. The Student, at age 12, would be the youngest in the unit. (Testimony of Brian Liu-Constant)
45. On July 16, 2015, the Student was evaluated by Dr. Molteni, a psychologist at the Hospital for Special Care, after he received a referral from Dr. Aguayo. The Student was aggressive but his aggression decreased as the evaluation went forward. The evaluator was not able to complete all assessments. The Student was able to do one step directions and point to body parts. (Testimony of Dr Molteni, B-15)
46. Dr. Molteni attempted to administer the Differential Abilities Scales, 2<sup>nd</sup> Edition, but he was not successful, and administered the Vineland Adaptive Rating Scales, the Social Responsiveness Scales (SRS-2)) and the Childhood Autism Rating Scale-2 (CARS-2).

Dr. Molteni found that the Student had ASD-Level-3, significant developmental challenges, Vineland Adaptive Scale scores in the well-below average range for his age (1%), SRS-2 scores in the moderate to severe range, and CARS-2 scores that were in the moderate to high range. Dr. Molteni diagnosis was Autism Disorder Level 3. This is the most severe level and requires substantial support. (Testimony of Dr Molteni, B-15)

47. Dr. Molteni opined that the Student required extensive supports to acquire the generalization of skills across all settings. He could not opine that the Student would make adequate yearly progress. The evaluator did not observe the Student in the home or his school setting. He was not aware of the Student's daily function at home and that it is challenging for the Parents to provide a consistent home environment. The doctor opined that due to the inability to complete the Student's assessments, no conclusion can be drawn about his cognitive or academic skills. The difference in the behaviors exhibited in school and home made it difficult to do a direct comparison between the forms completed by the Parent and the teachers. (Testimony of Dr Molteni, B-15)
48. On August 20, 2015, the Board convened a PPT for the 2015-16 school year. The PPT reviewed the most recent evaluation reports prepared by Dr. Weinberg, Dr. Molteni and reports prepared by Bradley Hospital and Hampstead Hospital. The Parents requested placement at Evergreen Center. (Testimony of Mother, P-21)
49. The Board recommended an assistive technology evaluation with recommendations made by Dr Molteni, and recommended an update of the Student's functional behavior assessment. The Chief Academic Officer testified that she agreed with Dr. Molteni's recommendations and that they were incorporated into the Student's 2015-16 IEP because CREC was already taking baseline data, the team had agreed to the AT evaluation, CREC was fading the use of prompts, CREC was minimizing the use of language, and CREC was addressing the Student's behaviors. (Testimony of Chief Academic Officer, P-21, P-15)
50. The Board offered four annual home visits for parent training to ensure carry-over from school to home, clinical review meetings at six week intervals, and up to 130 hours of supports from September 2, 2015 through December 31, 2015 from a mutually agreeable BCBA to provide the Parents with unspecified training on communication and daily living skills, with no goals and objectives associated with those BCBA service hours. (P-21). Further, the IEP did not list Parent Training and Counseling as a related service. The Board recommended a continuation of the CREC extended day and ESY program. The Parents rejected the IEP for the reason that it denied the Student FAPE and the proposed program was inconsistent with the recommendations from Parents' evaluators. (P-21)

### **CONCLUSIONS OF LAW and ARGUMENT:**

1. It is undisputed that the Student is eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 1401, et seq. FAPE is defined as special education and related services that are provided at public expense, meet the standards of the state

educational agency, include an appropriate school education, and that are provided in conformity with the IEP. 20 U.S.C. §1401(8).

2. The LEA has the burden of proving the appropriateness of the Student's program or placement, or of the program or placement proposed by the public agency. Conn. Agencies Regs. § 10-76h-14(a). This burden shall be met by a preponderance of the evidence. *Id*
3. In Board of Ed. v. Rowley, 458 U.S. 176, 206-07 (1982), the Supreme Court set forth a two-part inquiry as to whether the Board has provided an IEP that provides the Student with FAPE: 1) whether the Board has complied with the IDEA's procedural requirements, and 2) whether the Board's IEP was reasonably calculated to enable the student to receive meaningful educational benefit. Educational benefit, as contemplated by the IDEA, requires the Student's IEP to provide him with more than trivial educational benefit, that is, meaningful educational benefit, and not produce regression. Mr. and Mrs. M. v. Milford Bd. of Ed., 103 F.2d 1114, 1120-21 (2<sup>nd</sup> Cir. 1997). There is no requirement that an IEP has to maximize the Student's educational potential, however, it must provide the Student with "meaningful opportunities" and provide more than trivial advancement. "It cannot guarantee totally successful results." Walczak v. Florida Union Sch. Dist., 142 F.3d 119, at 130, 133. (2d Cir. 1998). Courts have also found that "[a] child need not improve in *every* area to obtain an educational benefit from his [or her] IEP." Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 554 (W.D. Pa. 2006).
4. The IEP is 'a written statement that sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.'" R.E. v. N.Y.C. Dep't of Educ., 694 F.3d at 175; and it is "... a plan about how to achieve that improvement." T.K. v. New York City Dept. of Ed., Docket No. 14-3078-cv, *slip op.* p.10, 2d Cir. (January 20, 2016) (citing M.O. v. N.Y.C. Dept. of Educ., 793 F. 3d 236, 239 (2<sup>nd</sup> Cir 2015).at p.11. The IEP is the centerpiece of the Student's entitlement to receive special education and related services. Honig v. Doe, 484 U.S. 305, 311 (1988).
5. In the first prong of the Rowley test, *supra*, there was no evidence presented that the Board violated any procedural requirements of the IDEIA during the 2013-2014, 2014-2015 and 2015-2016 school years, the years that are the focus of this hearing. PPTs were timely held and proper notice was given to all parties. The Parents received their procedural safeguards; they were meaningful participants at PPTS.
6. Although the second prong does not require that the state seek to "maximize" a disabled child's potential, nevertheless, "the door of public education must be opened in a 'meaningful way,' and the IEP must provide the opportunity for more than only 'trivial advancement.'" P. v. Newington, 546 F.3d at 119 (*quoting Walczak*, 142 F.3d at 130). "An appropriate public education under IDEA is one that is likely to produce progress, not regression." Walczak, 142 F.3d at 130. The program for the 2013-2014 school year was appropriate and the Student made progress in his program.

7. The Student is a young man with varied disabilities any one of which would severely hamper his educational abilities; combined, they present a Student requiring a highly specialized program. (Findings of Fact No.2 and 3) School districts must ensure that each child with a disability has appropriate supplementary aids and services. The Board, listening to the Parent's concerns, provided the Student with an extended school year program and school day program. (Findings of Fact No.4) The Board's program was also supplemented by DDS. They provided an additional 40 hours of weekly in-home support services to the Student. (Findings of Fact No.5) The Father requested an out of district placement which the Board was willing to consider. The Mother was not in agreement with the Father's request because at the out of district placement, the Student would receive fewer hours than the Board was providing. (Findings of Fact No.19)
8. The Student during his 2013-2014 school year did not master all his goals and objectives, but with the severity of his Autism and maladaptive behaviors, the Student did make meaningful progress. (Findings of Fact No.20, 21 and 22) Courts have found that "[a] child need not improve in *every* area to obtain an educational benefit from his [or her] IEP." Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 554 (W.D. Pa. 2006). The program for the 2013-2014 school year was appropriate and the Student made progress in his program.
9. The Student's 2014-2015 school year IEP was appropriate and provided the Student with FAPE in the LRE. The Student had made progress during the 2014-2015 school year. (Findings of Fact No.37) His aggressive behaviors in school had been reduced although the Parents complained that at home he was very aggressive and had to be hospitalized on two occasions. (Findings of Fact No.38)
10. The fact that a child with a cognitive disability may have limited potential for academic achievement in the general education classroom does not mean the child cannot receive an educational benefit in that environment. In addition to academic progress, nonacademic considerations such as self-care are equally important aspects of special education for some students. The Student demonstrates in the school environment the ability to follow a toileting protocol; this is also generalized with after school providers from Marrakech.
11. A child with the issues portrayed by the Student requires consistency in their program. (Findings of Fact No.29) The Parents argue that the Student does not generalize what he learns in school and at home he portrays a different picture than is reported by the School staff. The Parents are not cooperating in the trainings offered by the Board. (Findings of Fact No.35 and 36) The Mother testified that the training offered is not helpful, so she does not go after attending a PPT. (Findings of Fact No.40) The Parent could have called for a PPT to rectify what she sees as inadequate. In August 2015, the Mother went to a training session. (Testimony of Mother). The Student's IEPs goals and objectives for the 2014-2015 school are written to provide the Student with an appropriate program in the least restrictive environment. The Student's level of progress, though not at mastery

level, is sufficient to demonstrate that the Student has received FAPE in the LRE environment. (Findings of Fact No. 37, 38 and 39)

12. The program offered by the Board for the 2015-2016 school year is not appropriate.
13. The Student has three care givers in the home, his mother, grandmother, and on weekends, his father. The Parents testify of a high rate of frustration with the Student's behavior. The Parents and their witnesses all testify of a need for a therapeutic residential placement for the Student, and consistency between home and school environments if progress is to be made. The Student does not generalize what he has learned in school.
14. The Parents are divorced and the Student stays with the Father on weekends. There is a lack of consistency between the homes regarding the Student's activities. The Student's eating, sleeping and other activities of daily living are different in each home. All providers and evaluators are in agreement that without consistency across all environments the Student will not progress to levels where he will be able to expand his social skills.
15. In school, the Student is in a structured environment. There is a consistency in his start times and eating times; his bathroom protocol is every 1 ½ hours whether he imitates or an indirect prompt is used to take him to the bathroom. From the only report prepared by Marrakech, the staff reports in its progress review that the Student was successfully taught to urinate in the bathroom, pull down his pants and sit on the toilet. At home he smears his feces on the walls and takes off his clothes. While in the school and with the Marrakech staff, he does exhibit maladaptive behaviors but has yet to require hospitalization due to injurious behaviors (except on one occasion, for the chipped tooth from head banging). In the home, the Mother has had to hospitalize him twice and has contemplated hospitalizing him on other occasions. The Board offered to provide 130 hours of in-home parent training services. Though offered, it was not part of the IEP as a related service. C.F.R. §34.300.34 (c) (8) Individual related services terms defined. The terms used in this definition are defined as follows:
  - (i) Parent counseling and training means assisting parents in understanding the special needs of their child;
  - (ii) Providing parents with information about child development; and
  - (iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

Clearly 130 hours of in-home parent training services is a related service that must be shown in his IEP. (*See Parents' Post Trial Brief Proposed Findings of Fact pg. 12 Paragraph 23*). Even if it had not been offered as a related service, it is clearly necessary for the Student to receive FAPE.
16. Although the Parents were not taking advantage of the training offered by the Board, it does not mean the Board should not include in the Student's IEP a service that would assist the Parents in understanding why the Student does not generalize what he seems to be able to do in the school and with Marrakech. (Findings of Fact No.35 and 36) One of the Student's main caregivers in the home is the grandmother. The Board has not

considered including her in the training or inviting her to observe the clinical reviews. Although she speaks very limited English, translators could be provide to assist her in understanding why the Student's program is successful in the school environment and any changes that she could implement to have consistency across environments. The program offered by the Board is not appropriate.

17. The Parents request placement at Evergreen in Massachusetts. All the Parents' evaluators agree that the Student requires a therapeutic residential placement. Just because an evaluation indicates a student's need for a therapeutic placement, does not mean the district has an obligation to place the student in a residential facility. Federal courts have held that a district only has to provide a residential placement when doing so is necessary for the student to make educational progress. M.C. v. Starr, 64 IDELR 273 (D. Md. 2014) (The proposed therapeutic day school would have provided all of the services and supports the student required to receive FAPE). In this matter, Dr. Aguayo stated that she did not know if the Student would make educational progress in Evergreen Center (Findings of Fact No. 33) and Dr. Molteni could not opine if the Student would make educational progress in Evergreen Center (Findings of Fact No. 48)
18. Evergreen Center is not an appropriate placement for the Student. In P. v. Newington, 546 F.3d at 120, the Second Circuit expressly adopted the Third Circuit's test for determining whether an IEP places a student in the least restrictive environment, as set forth in Oberti v. Clementon School District, 995 F.2d 1204, 1215 (3d Cir. 1993). The two-pronged Oberti test states that a court must consider, first, "whether a student can be satisfactorily educated in the regular classroom with the benefit of supplemental aids and services," and, second, if the court determines the school district was justified in removing the child from the regular classroom and placing him or her in a special education classroom, "whether the school has included the child in school programs with nondisabled children to the maximum extent possible." P. v. Newington, 546 F.3d at 121 (quoting Oberti, 995 F.2d at 1218). When analyzing the first prong of the Oberti test, the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.
19. In this matter, it is the Parents who are seeking a more restrictive setting for the Student; the change is not from a general education environment to a more restrictive environment, but from a restrictive environment to a more restrictive environment. On the LRE continuum, an out of district residential placement is more restrictive than a special education environment in the district.
20. In analyzing Evergreen Center as an appropriate LRE, the first factor of the first prong of Oberti, Supra, asks, "whether the school district has made reasonable efforts to accommodate the child in a regular classroom, Clearly the District accommodates the Student in his classroom setting. The second factor in the first prong of Oberti is where a

change in placement to the more restrictive LRE, Evergreen Center, would fail the Oberti test. The district has not provided the Student with appropriate aids and services. See (Conclusions of Law No. 16 and 17). The Board needs to provide all appropriate supplementary aids and services before a more restrictive setting can be considered for the Student. Evergreen is not the Student's LRE; the Board must provide the in-home training services.

21. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

**FINAL DECISION AND ORDER:**

1. The program offered by the board for the 2013-2014 school year was appropriate.
2. The program offered by the board for the 2014-2015 school year was appropriate.
3. The program offered by the board for the 2015-2016 school year is not appropriate.
4. Within 10 school days of the publishing of this decision the Board shall conduct a PPT meeting to amend the Student's IEP to include 14 hours a week of in-home-training (two hours per day) by a BCBA. The 14 hours shall consist of two hours each day where the Student is residing on that particular day.
  - a. The first two weeks the BCBA shall take data of the Student's behavior in the home and toileting protocol. The data shall be taken of the Student both in the Mother's House and in the Father's house. The BCBA shall train the Parents and the grandmother on how to take data.
  - b. The Board shall provide a translator to accompany the BCBA to the Mother's home at all times to ensure that the grandmother understands what needs to be done.
  - c. After two weeks of data collection, the Board shall conduct a PPT to review the data and plan an in-home program to assist and train the Parents and the grandmother on the generalization of toileting and self-help skills the Student is learning in the ADL room.
  - d. This service shall be a part of the Student's IEP and shall continue and be reviewed in his annual PPT meeting.
  - e. The BCBA shall also contact Marrakech to observe the Student for two one hour sessions for the same two weeks that data is being collected from the home, unless Marrakech can provide the information from their own data collection for that two week period.
  - f. Dr. Loss and Dr. Weinberg shall be contacted and they will confer and recommend a mutually agreed upon BCBA to provide the data collection and in-home services and training.

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

Justino Rosado  
Hearing Officer Name in Print