

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Orange Board of Education:

Appearing on Behalf of the Parents: Attorney Nora Belanger
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Appearing on Behalf of the Board: Attorney Craig Meuser
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Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUES:

1. Was the Program offered the Student by the Board for the 2006-2007 school year appropriate?
2. Is the Program offered by the Board for the 2007-2008 school year appropriate? If not;
3. Should the Student be placed at the Children's Center for Child Development for the 2007-2008 school year?
4. Should the Student be provided with an extended school year program for the 2007-2008 school year?
5. Is the Student entitled to compensatory education for the 2006-2007 school year?
6. Should the Board reimburse the Parents for the independent evaluation performed by Doctors Power and Molteni?
7. Did the Board violate the Student's procedural safeguards by failing to inform the Parents about the Student's lack of progress, exclude the Parents from the decision making process, failure to respond to the Parents' concerns and failure to inform the Parents about extended physical restraints?

SUMMARY:

The Student is now an eight year old child diagnosed with Pervasive Developmental Disorder and was deemed eligible for special education and related services by the Board in 2002 when he was 3 years old. The district stated at PPTs on 10/10/07 and 10/30/07 that they could not provide an appropriate program and recommended outplacement. The Parents had the Student evaluated by the Center for

Children with Special Needs, that determined that the program provided by the district was not appropriate to meet the Student's needs and that the suggested outplacement programs recommended by the Board were not appropriate. Failing to come to an agreement about which outplacement was appropriate, the district filed for an expedited due process hearing against the Parents on 11/7/07, alleging that they could not provide an appropriate program and that the Student was a safety risk to himself and others. The Parents filed a response complaint stating that the district was not providing an appropriate program, and that the placements recommended by the Board were not appropriate. A PPT was convened on 12/10/07, the first day of hearing, whereby the Board asserted it could provide an appropriate program in district as long as the Parents agreed to the use of physical restraints as an integral part of the behavior plan. The Parents did not agree and the due process proceeded. On 1/17/08, the Parents sent a letter to the Board informing them that they would, effective 2/11/08, unilaterally enrolling the Student at CCCD.

PROCEDURAL HISTORY:

This matter was presented as a contested matter 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.

The hearing commenced on December 10, 2007 and ended on February 27, 2008, lasting a total of 11 sessions. The parties appeared on 12/10/07, 12/12/07, 12/19/07, 1/4/08, 1/10/08, 1/24/08, 1/28/08, 2/4/08, 2/15/08, 2/19/08 and 2/27/08.

The Parents presented 5 witnesses and the Board presented 6 witnesses in their case. At the 2/27/08 hearing date, the following proposed Parents' exhibits were never made full exhibits during the hearing: #s 46; 53; 57; 58; 62; 64; 76; 77; 90; 91; 92; 93; 94; and 103. and the following proposed Parents' exhibits were stricken as exhibits by the Hearing Officer: #s 61; 82; 83; 84; 85; and 102.

The Board filed a request for a due process hearing on November 7, 2007. The Parents filed a due process request, in the form of a counter-claim, on November 19, 2007. The Parents received notice of the due process request on 11/7/07 and a hearing officer was appointed on 11/7/07. A prehearing conference was held on 11/14/07. The Board had requested that this hearing be an expedited hearing. IDEA clearly states that an expedited hearing is a hearing where the parent challenges a manifestation determination or any decision regarding placement under 34 CFR §300.530 and §300.531. This hearing did not qualify as an expedited hearing.

At the initial December 10, 2007 hearing the Board withdrew its hearing request. The Hearing Officer granted the Parents' request to add the issues from their counter-claim to Case No. 07-349, and they began their case-in-chief at the December 12, 2007 hearing.

Two prehearing conferences were held before the first date of hearing.

At the close of the evidentiary hearings on February 27, 2008, the parties were given the opportunity to file briefs postmarked March 31, 2008.

On or about April 1, 2008, the Board filed a Motion to Dismiss additional claims raised by the Parents in their Post Trial Brief. The Parents filed a timely objection to the Board's Motion. On or about April 18, 2008, the following claims raised by the Parents in their Post Trial Brief were dismissed because they had not been properly claimed as issues of this hearing and therefore the Hearing Officer did not have jurisdiction to render a decision:

1. Denial of FAPE for the summer of 2007
2. Denial of FAPE for the summer 2008
3. Denial of FAPE for the 2008-2009 school year
4. Reimbursement for extended school year 2008, including related services for OT and speech
5. Outplacement of the Student at CCCD for the 2008-09 and the 2009-10 school years, including ESY.

The date of the mailing of the Final Decision and Order was extended to June 3, 2008 in order to accommodate the Post Trial Brief schedule, the obtaining of transcripts to respond to the Post Brief Motion to Dismiss and to review the voluminous record.

This Final Decision and Order sets 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. To the extent that the summary and findings of fact actually represent conclusions of law, they 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).

FINDINGS OF FACTS:

1. The Student is an 8 year old child with deficits in areas of socialization, communication, motor, and cognitive performance, who was first diagnosed with Pervasive Developmental Disorder is entitled to receive a free and appropriate public education as defined in Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. The Student has received special education and related services from the Board since he turned 3 years old. (Testimony of Mother)
2. In 2002 the Student was evaluated by a Center for Children with Special Needs (CCSN). The evaluator diagnosed the Student as autistic with communications, social, sensory and behavioral issues. It was recommended that the Student receive an intensive

30 hour per week ABA program, positive behavioral strategies and inclusion opportunities. Parents' Exhibit ¹-47, P-48 and Mother's Testimony)

3. In December 2004, the Board had CCSN again evaluated the Student. The evaluator found that the Student had made some gains, including emerging speech and reading skills. The evaluator recommended a 30 hour per week ABA program, positive behavioral strategies and a reading program to assist the Student with his emerging reading skills. The evaluator also recommended a summer program of 6-7 weeks, of at least 5 hours each day. The evaluator also found that the Student's social skills had improved but only recommended one hour of socialization with typical peers during the summer programs, if possible. CCSN supervised the Student's ABA program in preschool and kindergarten. (Testimony of Mother and CCSN Psychologist, P-8)

4. The CCSN evaluator and his team supervised the educational and behavioral ABA program in preschool and kindergarten of the Student. The Student was included in snack, recess, lunch and specials. By the end of his 2004-2005 kindergarten school year, the Student had approximately 10 behaviors episodes a day and head banging was minimal. The behavior program was a positive behavior plan with functional communication training, and without physical restraint. The Student was able to access his education while participating with other children and controlling his behavior. (Testimony of Mother and CCSN Psychologist, P-11 and School Behavioral Analyst)

5. At the beginning of the Student's kindergarten school year, he was given a speech and language evaluation. The Student demonstrated progress in comprehension and production of longer utterances including 3-5 word phrases. The Student still showed delays in expressive and receptive language and social pragmatic skills. He demonstrated progress in interacting with his peers in a structured environment but still required intensive support to maintain appropriate social interactions. The evaluator found the Student challenged by his sensory needs. The evaluator recommended that the Student continue receiving speech services. (Board's Exhibit² # 2)

6. During 2005-2006 school year, the Student was doing well and his behavioral episodes had dropped. The Student behavioral episodes consisted of hitting, kicking and pushing and would pull hair. There were no self injuries. The Student's inclusion time was a difficult period to increase. The Parents request further inclusion of the Student. The district had difficulty increasing inclusion for the Student because his many behaviors were impeding the team's ability to successfully include him in kindergarten. When the Student's routine was disrupted he would engage in aggressive behavior. He would kick and lash out to stop the staff from interfering with what he wanted to do. (Testimony of Mother, Testimony of Director of Special Services)

7. A transition plan was established to transition the Student in entering the 1st grade in his new school. Staff was identified from the sending school and the receiving school. The team from the receiving school observed the Student in his environment. A PPT took

¹ Hereafter Parents' Exhibits shall be noted as "P" followed by the exhibit number.

² Hereafter Board's Exhibits will be noted by "B" followed by the exhibit number.

place in May 2006 to discuss the Student's transition to his 1st grade school. The mother was anxious over the transition so there were meetings set up with the Parent in the transition process. The 1st grade teacher worked with the Student at the end of summer as a tutor in order for him to maintain his skill levels. (P-9, Testimony of Director of Special Services,)

8. The Student's summer 2006 program started out slow but progressed to the point where he had regained almost all his previously mastered skills. His behavior looked the same but incidents of head banging were low. The Student was able to master independently completing matching and other one-step direction work sheets. In order for the Student to become comfortable with social interactions with peers, it was recommended that interaction with peers should be set up in a prearranged environment. A new behavior plan was not fully established at that time. (P-11)

9. On August 21, 2006, a Behavioral Support Plan (BSP) was established to assist the student in his new school environment. The plan alludes to a Functional Behavioral Assessment (FBA) that was developed in July 25, 2006 by the district's Board Certified Behavioral Analyst (BCBA) but not shown to the Parents or the Director of Special Education. The Parent requested the FBA from the BCBA and was told it would be provided to her. The BCBA did not give the Parent the FBA. The BSP began with an initial phase (Phase 1) which last from September 2006 to October 2006. The plan placed low demands on the Student and has him using words to diminish aggressive behaviors. Disruptive behaviors were not targeted during Phase 1. The Student spent all of his time in the resource room. The only measure of success was the reduction of incidents in aggressive behavior. The Student made steady progress with respect to reducing his aggression during this period. The aggressive incidents that continued to occur were mild in intensity and occurred for less than 30 seconds. There was not a focus on academics during this phase. (Testimony of Director of Special Services, Testimony of Mother, P-15, P-17, P-50 pp. 238-239, Testimony of District's BCBA)

10. Once the Student entered the 1st grade school, the Parents testified the program was "all about behaviors," not academics. Team meetings and PPTs focused on behavior and did not address academics. Demands were reduced and inclusion was stopped in order to attempt to get behaviors under control. Staff was trained to teach the Student functional communication training so that he may use language as a replacement for inappropriate behavior. When the Student became agitated the educational team would model communication and prompt the Student. (Testimony of Mother, Testimony of District's BCBA)

11. The Student's 2006-2007 IEP contained 15 goals and an autism model providing academics, behavior and social emotional supports. The Student was provide with 2 ½ hours of speech and language, 1 hour of occupational therapy and a one on one paraprofessional. The Student's inclusion program would be for 10 hours each week as deemed appropriate by the educational team. (P-8)

12. Phase 2 of the Student's BSP began in the middle of October 2006. The goal of this phase was to continue to reduce the incidents of aggression and to increase the use of spontaneous language to express preferences and needs. During this phase the Student remained in the resource room and demands were maintained at a minimum. The Student was permitted to use the computer for 20 minutes and attend music class for 10 minutes. The Student would be shown to use spontaneous language to request what he wants. During Phase 2 the occurrences of aggressive behavior was reduced significantly with a reduction in demands and an increase in spontaneous language. The Student attained the goals there were set for Phase 2 and was averaging 5.6 incidents each day.. (P-19, Testimony of BCBA)

13. At a 10/18/2006 PPT, the Student's inclusion time was reduced to 0 because he was having incidents. He was exhibiting disruptive behaviors that were interfering with his ability to learn even in a small structured setting and the teams' ability to move him into a more inclusive setting. Inclusion was kept at a low level in the 1st 3 phases of his behavior plan. The Parents felt that the Student was not making progress. The team was concerned about other children becoming injured or becoming fearful of the Student. The Student's speech and language service was increased 1 hour and 5 hours with the behavioral consultant was added to his IEP. The Board provided highly qualified special education teachers for the Student. (Testimony of Director of Special Education, B-3)

14. During Phase 3, there was an emphasis on maintaining aggression at or below 5 incidents daily while increasing the Student's inclusion and increasing demands. Time-out would be used as a consequence for aggression. This phase of his behavioral plan was incorporated in November 2006 and continued to January 19, 2007. The Student would continue receiving his services primarily in the Resource Room. During Phase 3 the Student's aggressive behavior were 5.8 incidents daily, despite the increase of approximately 2 hours each day of curriculum activities. The goals set for Phase 3 of the behavior plan were partially reached. His goal of the reduction of the level of intensity and aggression was not attained. The Student's participation in activities with typical peers was not achieved. In the month of December 2006 the Student's engagement sheet showed a total of 67 minutes of inclusion.(P-25, B-37)

15. The progress report of the Student's 2006-2007 IEP showed that he had not mastered any goals. The Student was able to master 7 objectives, satisfactory progress in 29 objectives, limited progress in 20 objectives and no progress in 2 objectives. (B-3)

16. On August 2007, CCSN was retained by the Parents to perform another evaluation of the Student. The Parents were concerned about behavioral interventions and the ability of the Board to manage the Student without restraint procedures. The evaluator reviewed behavior plans and incident of injury to staff member. The 2006-2007 IEP, 2007-2008 IEP, behavior summaries and prior evaluations conducted by CCSN. The evaluator did not see or review a Functional Behavioral Assessment of the Student. (Testimony of CCSN Psychologist)

17. The BCBA did not share his FBA with the Director of Special Education. When target behaviors changed, modifications to the Student's behavior plan were done by FBA statements but not in a new FBA. The IEP's stated that all goals and objectives would be implemented by the educational team. This meant that everyone worked in conjunction with one another. (Testimony of Director of Special Services)

18. In the fall of 2007, the Board established a new position called an autism coordinator. The coordinator role was to establish a continuum of services for children on the spectrum in a consistent manner throughout the 3 elementary schools. The coordinator would serve a liaison between the parent and the school, coordinates parent and team meetings and observations, and review the data collected of the students with the psychologist, the (BCBA), the speech and language pathologist, special education teacher and any other service provider. (Testimony of Director of Special Services)

19. The Student's paraprofessional had been with him for over 2 years. In order to maintain continuity with the Student, she was approached to continue working with the Student as he transitioned to a new school. In his 1st grade program, she was with him for the 6 hours of his school day. She noted that his behavior had improved from kindergarten to the 1st grade and he was spending more time with non-disabled peers. It was part of her responsibility to collect data about the Student and photocopy it in order to send the data home in the Student's folder. The paraprofessional collected data on academic skills that were in the Student's IEP. The paraprofessional worked with the Student on functional communication. She would utilize wipe off board to write phrases to help reduce his frustration and also note cards. (Testimony of Lead Therapist)

20. The paraprofessionals had received Physical Management Training (PMT) in order to perform over-correction and basket hold as a consequence of the Student's behavior. Phase 4 of the Student's behavior plan dictated when over-correction was performed. In over-correction the Student was told to sit in a chair and fold his hands. The Student was required to stay in that position for 5 minutes; this was later reduced to 3 minutes because it was too long of duration for the Student. If the Student's hands were not quiet, she would physically prompt him by holding his hands. The behaviors that caused this punishment were swatting at materials, kicking, head banging and throwing items. Whining would not be a reason to utilize over-correction. (Testimony of Lead Therapist)

21. Over-correction was not performed in the presence of any other student. The Student's head butts occurred more often when he is placed in the over-correction procedure. The problem with over-correction was that if the Student hit during over-correction, there was no consequence. Phase 4 lasted from 1/23/07 to 5/1/07. (Testimony of District's BCBA, P-50 pp. 137, 142)

22. Basket hold was introduced in Phase 5 of the Student's behavior plan and it would only be utilized when the Student was physically aggressive to staff or self-injury. This was used to attempt to decrease to zero the Student's aggressive acts and allow him to engage in academic tasks. The basket hold was only to be used for aggressive acts when he presented a danger to himself or to others. The basket hold procedure was not painful,

its purpose was to stop the Student from head banging and head butting during hand holding procedure. He was using his head to hit people who were holding his hands. The team felt that basket hold would eventually be faded out of the Student's behavior plan. When basket hold was utilized, the Student exhibited fewer behaviors and he was more open to academic learning. (Testimony of Lead Therapist, Testimony of District's BCBA, Testimony of Director of Special Services)

23. Phase 5 was utilized from May 1, 2007 to June 21, 2007. Noncompliance and whining, after one redirection, were added as target behaviors during this phase. When a targeted behavior occurred, it was followed by 3 minutes of hand folding. When a target behavior occurred during over correction, or if he did not fold his hands independently or with physical assistance, 5 minutes of basket hold procedures was initiated. During this phase the frequency of target behaviors was reduced and the Student was more available for instruction. Although the function of the Student's aggressive behavior was escape, the use of over-correction and timeout allowed the Student to escape; thereby reinforcing the behavior. (b-12, B-14, Testimony of CCSN Consultant)

24. During the summer of 2007, the Parents withdrew their permission for the district to use basket hold as part of the Student's behavior plan. (Testimony of Director of Special Services)

25. In September 2007, the district contacted a consultant to review the behavior plan and if time outs and holding were a necessary component of the plan. The consultant reviewed the Student's current behavior plan, progress reports about other plans and data involving those plans and did an observation of the Student in the program. An FBA was not provided for review but there were summary statements of the possible functions of the problem behavior. The consultant met with school personnel and they expressed their concern that the Student was not available for learning and that there was a decrease in expressive language. The Student was not in an inclusion environment. During the observation he received his instructions from the paraprofessionals and did not receive any instruction from his special education teacher. The consultant was not asked to write a report and at the October 10, 2007 PPT. Even though the IEP states that the consultant shared an overview of her observations, the consultant denied that it took place. She was not asked to present any recommendations or share her views of her observations with the PPT team. (Testimony of Jeanette Johnson)

26. The use of physical restraints was inappropriate and should only be reserved for crisis intervention rather than problematic punishment procedures as part of the Student's behavior plan. The plan was low on the instruction of alternative behavioral skills. The plan was missing proactive pieces that are necessary for a long lasting behavioral change. This made his program at the district school inappropriate and an out of district placement appropriate. The use of over-correction with folding hand was in reality a time-out. A time out is appropriate in a crisis situation to maintain the learning opportunities of other students. Disruptive behavior does not necessarily require physical restraint. (Testimony of Jeanette Johnson)

27. The Student was evaluated by a child psychiatrist to address his behaviors and facilitate mainstream opportunities. He attended two team meetings to get the teams assessments of the Student and learn about their plans. The meetings were not attended by the Parent. The psychiatrist observed the Student twice in the school setting for a total of approximately 4 hours, once in February 2007 and again in April of 2007. He issued a report in April after the second observation was completed. The psychiatrist affirmed the appropriateness of the Student's 2006-2007 program. He concluded after his April observation that there was a dramatic decrease in the Student's daily aggressive behaviors. In order to achieve this reduction, the Student needs 2 one-on-one aides. The psychiatrist stated that he did not observe the Student interacting with other students; had low demands and he only saw the para-professionals working with the Student, never the special education teacher. (Testimony of Psychiatrist, B-7)

28. The psychiatrist made the following recommendations from his observations and discussions with the team:

- a. The Student's complex needs were in multiple domains, cognitive, expression. Student required significant structure and supervision to meet his academic and social goals.
- b. Slowly increase and evaluate his inclusion in the mainstream and evaluate these transitions.
- c. A focused medication evaluation to determine whether medication would add greater control; decrease regressive behavior and improve control over the Student's impulsivity.
- d. Recommended that the Behavioral consultant continue in his role.

(Testimony of Psychiatrist, B-7)

29. The Parents retained a consultant from Center for Children with Special Needs (CCSN) to review the current behavioral interventions, the ability of the district to manage the Student without the use of restraint procedures, and his ability to access the curriculum. The consultant performed a Differential Abilities Scales 2nd Edition (DAS), which assesses the Student across domains of Verbal Reasoning. The evaluation found the Student's clusters ranged from borderline to well below average for his age. Non-verbal reasoning skills were well below age expectations by greater than 2 standard deviations and verbal reasoning abilities were substantially compromised at greater than 3 standard deviations. The evaluator also performed the Vineland-II Adaptive Behavior Scales to survey the Student's communication, daily living, socialization and motor skills through parent or teacher reports. The Parents were the informants for this evaluation. The Student's overall levels of adaptive ability were in the low range for his age level. The Student was also given the Autism Diagnostic Observation Schedule-Module 1 (ADOS). ADOS assesses areas of communication and reciprocal social interactions utilizing semi-structured play opportunities. (Testimony of CCSN Consultant, P-48)

30. In 2006-07 and 2007-08 school years, there was one behavior plan in place, which was comprised of seven phases. The plan did not outline strategies to replace the behaviors and did not specify strategies for functional communication training or positive behavioral techniques. The Student is not a spontaneous communicator. Phase 4 of the

behavior plan introduced over correction, a punishment procedure, with the purpose of decreasing the aggressive behavior and increasing positive behavior. Over correction should be related to the behavior you want the Student to exhibit. The Student is using his aggressive behavior in order to escape a task. Phase 4 over correction removes the Student from the task at hand and has him sit and fold his hands away from the actual task. If over correction is to work it should work quickly and bring the behavior down to where the BCBA wants it to be. (Testimony of CCSN Consultant)

31. The Student's 2007-2008 IEP contained 13 goals and 59 objectives. The IEP contained 3.5 hours each week of direct speech and language services, 4.5 hours each week of inclusion and 4 hours each month of involvement of the BCBA. The 11/20/07 progress report of this IEP showed that the Student had mastered 0 goals. He had mastered 4 objectives and was having satisfactory progress in 17 objectives. 21 objectives the district was not able to access and 17 objectives were not introduced. (B-9, P-101)

32. The speech and language pathologist completed progress reports for 1st grade and sent them home with the Student. She was not informed that the Parents had not received them. The Student currently uses 7 word sentences. The pathologist supported the board's decision to out place the Student and also supported their December 10, 2007 decision of an in-district program. (Testimony of Speech and Language Pathologist)

33. The setting for instruction in 06-07 and 07-08 school years was the resource room. The Student was secluded on one side of the room by a partition that separated him from all the other students. In January of 2007, the Student's academic demands were increased to 2 hours. There was a dramatic decrease in the number and severity of the Student's behavioral outbursts and incidents between January and June of 2007. The data sheets collected in regarding identified academic skills such as "wh" questions and decoding of syllables demonstrate the increasing academic demands placed on the Student by the spring of 2007. (Testimony of Special Education Teacher, B-30 through 35)

34. The Student had a list of different phrases he uses and they were modeled for him. A record was kept of the Student's inclusion time in the engagement sheets. These were shared with the Parent and sent home in the Student's backpack with the communication log. (Testimony of Special Education Teacher)

35. The CCSN evaluation made the following recommendations:

- a. An extended school year program (ESY) to address the Student's academic, social, communication and adaptive living skills. The program should be based on adaptive behavior analysis (ABA).
- b. An IEP whose objectives should be developed as written learning objectives.
- c. The recommended placement for the Student is an out of district placement either at CCCD in Milford or the River Street Autism Program in Windsor, CT.

- d. All social teaching should be highly individualized, evaluated, and be supported by the direct participation of the BCBA and the special education team.
- e. An FBA should be undertaken to address the Student's behavior regarding aggression and self-injury and the modification of the behavior plan.
- f. The use of Touch Math and Touch Money incorporated in his numeric curriculum.
- g. If need be, after a clinical intervention addressing the functional assessment and behavior treatment plan is considered, a pharmacologic intervention should be considered.
- h. Reevaluation after one year would be appropriate to provide updated information for program planning purposes. (P-48)

36. CCCD is a state certified school that currently works exclusively with autistic children the majority of which have behavioral issues. As part of the program CCCD uses an outreach program at home thereby providing a consistent intervention program between the Student and home. CCCD also provides parent training. The Student would not be isolated for the entire school day. The Student could be provided his occupational therapy and speech and language services by an outside agency. CCCD would provide an appropriate program for the Student. (Testimony of Judith Palazzo, Testimony of CCSN Consultant)

37. ABA strategies were utilized to teach the Student

- a. Incidental teaching where another student in the resource room was doing something and the Student would be observing and his aides would explain what they were doing.
- b. Positive reinforcements were part of the Student's school day.
- c. Preference assessments were utilized to keep the Student engaged.
- d. Statements that would help the Student get what he needed or what he was looking for were taught to the Student as part of his functional communication training (FCT). The Student's speech and language therapist did not train the Student's special education teacher or paraprofessionals in FCT.
- e. Task or activities were broken down into component parts and taught to the Student. This was chaining or shaping (Testimony of Director of Special Services)

38. At the October 10, 2007 PPT, the Board began investigating an out-of-district placement for the Student. This was supported by the team since the relationship between the District and the Parents had deteriorated. In order for the Student to succeed the team felt that the Student needed an environment that the Parents' trusted. The team felt that Phase 5 of the behavior plan was appropriate for the Student, but the Parents withdrew their permission for the District to use the basket hold. At the October 30, 2007 PPT, the team recommended High Roads as an out-of-district placement for the Student. The Parents were not in agreement with the Board's recommendation and felt that

Connecticut Center for Child Development (CCCD) in Milford is the appropriate placement for the Student. The team rejected the Parents' request because it did not offer the level of related services in speech and language and occupational therapy that the Student required. (Testimony of Director of Special Services)

39. During his 2007-2008 school year, given the variables of the Student's behavior, he was only available for appropriate academic learning for about one hour each day. The engagement calendars showed academic sets that were presented to the Student for which he was available to learn. (Testimony of Director of Special Services)

40. At the December 10, 2007 PPT, the Board recommended an in-district placement for the Student. The team offered an additional BCBA to work with the Student's behavior plan and no inclusion for the Student. The team also included basket hold as a necessary component of his IEP. (Testimony of Director of Special Services)

CONCLUSIONS OF LAW:

1. IDEA defines FAPE as special education and related services which are provided at public expense, meet the standards of the state educational agency, include and appropriate school education, and are provided in conformity with the IEP. 20 U.S.C. §1401 (8). Connecticut regulations provide "the public agency has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency." Conn. Reg. §10-67h-14(a). The Supreme Court's decision in Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005) has not altered the Board's obligation to establish the appropriateness of the program or services it has offered.

2. The IEP serves as the centerpiece of a student's entitlement to special education under the IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). The primary safeguard is the obligatory development of an IEP which must contain a statement of the child's current educational performance, including how his disability affects his involvement and progress in the general curriculum, and a statement of "measurable annual goals, including benchmarks or short term objectives related to meeting the child's individual needs." 20 U.S.C. Section 1414(d)(1)(A)(ii); 34 C.F.R. Section 300.347; Roland M. v. Concord School Committee, 910 F.2d 983,987 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991)..

3. The standard for determining whether a school district has provided FAPE is set forth as a two part inquiry in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). First, it must be determined whether the school district complied with the procedural requirements of IDEA and second, there must be a showing that the individualized educational plan ("IEP") is reasonably calculated to enable the child to receive educational benefit. The requirement of FAPE is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Education v. Rowley, 458 U.S. at

201. This standard of educational benefit, however, contemplates more than trivial advancement. (Mrs. B. ex rel M.M. v. Milford Board of Education, 103 F.3d 1114 (2d Cir. 1997))

4. The IDEA's procedural requirements and safeguards are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with LEA personnel in developing, reviewing and revising their child's IEP. There is no one standard for determining what constitutes a meaningful, educational benefit. The student's capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit to the child. See, e.g. Hall, 774 F.2d at 635. Objective factors such as passing marks and advancement from grade to grade can be indicators of meaningful educational benefits but are not in and of themselves dispositive. See, e.g., Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1120 (2nd Cir. 1997). Compliance with the IDEA's procedural requirements is the responsibility of the board and not the parents. Unified Sch. Dist. v. Dept. of Ed., 64 Conn. App. 273, 285 (2001). Procedural violations alone can be deemed a denial of FAPE. Student v. Newtown B.O.E., CT DOE Case No. 07-075 (8/23/07). In order to conclude that procedural violations resulted in a denial of a FAPE, the parents must show that the procedural errors resulted in a loss of educational opportunity. Id. at 22; See, Burke County Bd. of Ed. v. Denton, 895 F.2d 973, 982 (4th Cir. 1999); Evans v. District No. 17, 841 F.2d 824, 830 (8th Cir. 1988); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484-85 (9th Cir. 1992). When a procedural violation is alleged, a hearing officer may find that a student did not receive FAPE if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or caused a deprivation of educational benefit. 34 CFR §300.513(a) (2) (i-iii); Id. at 22; See, Burke at 982; Evans at 830; W.G. at 1484-8. Procedural violations that interfere with parents' participation in the IEP formulation process undermine the very essence of IDEA. Amanda J. ex rel Annette J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001). An IEP addresses the unique needs of the child and cannot be developed if those people most familiar with the child's needs are not involved or fully informed. Id. Procedural safeguards are set forth in 20 U.S.C. §1415 and 34 CFR §§500-536 and include: the right for parents to participate in all meetings (CFR §300.501(b)); the right for parental involvement in placement decisions (CFR §300.501(c)); the right of parents to examine all educational records (CFR §300.501(a)); the right for parents to obtain an independent educational evaluation (IEE) of their child (§300.502(b)); the requirement for boards to consider evaluations provided by parents at private expense in the deciding FAPE (CFR §300.502(c)). IDEA expects strong parental input at PPT meetings, Warren G. v. Cumberland County Sch. Dist., 190 F. 3d 80, 86 (3d Cir. 1993). The IEP is to be collaborative developed by the Parents of the Student, educators and other specialists and Congress repeatedly emphasized the "importance and indeed the necessity of Parental participation in both the development of the IEP and any subsequent assessments." Honig v. Doe 484 U.S. 305, 311 (1988). Failure by the Board to develop an IEP in accordance

with procedures mandated by IDEA, in and of itself, can be deemed a denial of FAPE. Amanda J. ex rel Annette J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir.2001).

5. The Parents allege that there were procedural violations in that they were excluded from decision making process. but the record clearly shows that the Parents attended all PPT meetings that created and/or revised the Student's IEP for the 2006-2007 and 2007-2008 school years. (P- 8, B- 3, B- 5,B- 9, B- 15, B- 19, B- 25) The Parents also attended monthly team meetings throughout the two school years, where they were apprised of the Student's behavioral and academic progress. (P-6, P-7, P-13) The Parents conversed and corresponded with multiple staff members in each school year and immediately preceding and following team and PPT meetings to ensure their views were heard with regard to the Student's IEP documents and behavioral plan. (P-50) Exhibits were provided of different phases of behavioral plans (Findings of Facts#8, 11, 13, 21) as to these issues. The district did not violate the Parents' procedural rights.

6. One item of contention by the Parents was their inability to see or obtain the FBA made of the Student. (Findings of Facts #8) A functional behavioral assessment is generally considered to be an approach that incorporates a variety of techniques and strategies to diagnose the causes and to identify likely interventions intended to address problem behaviors. In other words, FBA looks beyond the overt topography of the behavior, and focuses, instead, upon identifying biological, social, affective, and environmental factors that initiate, sustain, or end the behavior in question. Source: An IEP Team's Introduction to Functional Behavior Assessments and Intervention Plans, 2d ed. See also Independent School District No. 2310, 29 IDELR 330 (SEA MN 1998), stating the general purpose of FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with a child's education. The process involves some variant of identifying the core or "target" behavior; observing the pupil (perhaps in different environments) and collecting data on the target behavior, antecedents, and consequences; formulating a hypothesis about the cause(s) of the behavior; developing an intervention(s) to test the hypothesis; and collecting data on the effectiveness of the intervention(s) in changing the behavior. IDEA identifies the right of parents to examine all educational records. (CFR §300.501(a)). This was denied not only to the parents but the BCBA did not share it with the educational team. (Findings Of Facts # 8, 16, 24) Even though the Student's special education teacher testified she had seen the FBA, the BCBA stated he had not shared the report. This key assessment of the Student was not seen by the Parent nor the IEP team during the 2006-2007 and 2007-2008 PPT meetings. This was a procedural violation but not such an egregious violation that by itself caused the Student's program to be an inappropriate program.

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

8. The second prong of Rowley requiring the IEP to be reasonably calculated to enable the child to receive some educational benefit was also not satisfied. The focus of the program was on behaviors and academics were neglected. The IDEA does not

prohibit the use of seclusion and restraint as long as the interventions do not deny the student FAPE and are consistent with the student's IEP. Even though the Student's behavior plan called for seclusion and restrains, his behavioral problems were interfering with his ability to obtain educational benefits, as it appeared the staff at his school had to spend an inordinate amount of time responding to his behavioral aggressions, (Findings Of Facts # 8, 9, 11, 38) which when they were at their best only allowed the Student from 2 hours of academics each day in the 2006-2007 school year (Findings of Facts 12) and 1 hour of academics each day in the 2007-2008 school year. (Findings of Facts 38) The evidence shows that the Student's aggressive behaviors were continuing, even as he made small gains in some academic area. The record showed that the Student did not master any goal during his 2006-2007(Findings of Facts # 14) and 2007-2008 school year. (Findings of Facts # 30) I agree with the Jeanette Johnson that the use of physical restraints in the over correction was inappropriate and as the CCSN evaluator testified overcorrection led the Student to utilize it as means to escape a task. (Findings of Facts # 24, 29)

9. The IEP team was correct when at the 10/10/07 and again at the 10/30/07 PPT meeting agreed to send the Student to an out of district placement. "[A] program... must, at a bare minimum, aim to teach the child to control his own behavior" and school's failure to provide a plan to "enable [the Student]...to control his own behavior in the absence of continuous adult restraint" is inappropriate as it would leave Student without "hope to succeed in a regular classroom or in the outside world." Chris D. v. Montgomery County Bd. of Educ., 753 F.Supp.922, 929-9311 (M.D. Ala. 1990). The Student clearly had not learned to control his own behavior. Physical restraints were increased and aggressive behaviors continued. The Parent and CCSN Consultant testified the Board's behavior plan were the cause of the continued aggressive behaviors that impeded the Student from obtaining "more than trivial advancement." (Mrs. B. ex rel M.M. v. Milford Board of Education, 103 F.3d 1114 (2d Cir. 1997). In the case at hand, the Board did not prove by a preponderance of the evidence that IEPs, programs, or placement were appropriate in the 2006-2007 and the 2007-2008 school years, or that the Student made meaningful progress.

10. IDEA clearly expresses that disabled children should be educated alongside non-disabled peers "to the maximum extent appropriate," special education services must be provided in the least restrictive environment consistent with the child's educational plan. Only when "'the nature or severity' of a child's disability is such 'that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily' should a child be segregated." Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) (quoting 20 U.S.C. ? 1412(5)). The Student educational placement was in the resource room with minimal to no inclusion. It is clear that a placement at CCCD as requested by the Parents is further down the continuum of the least restrictive environment. The Board had contemplated this action at the 10/10/07 and the 10/30/07 PPTs but decided against it at the 12/10/07 PPT. They were of the opinion that they could provide the Student an appropriate program with the addition of another BCBA and a return to the basket hold that the Parents had refused to grant permission. The reinstatement of the basket hold as a necessary component of the Student's program is

basically telling the Parents that there is no other means by which the Board can give their child a meaningful education. The Board should have continued with their plan of an out of district placement for the Student. The Board had originally sent the Parents to review the program at CCCD but changed their mind as to its appropriateness. (See Findings of Facts #37) I disagree with the Board, at this juncture placement at CCCD would provide the Student with FAPE in the LRE. (See Findings of Facts #33) This does not mean that the Student cannot in the future return to the District school.

11. The Student while in the District's school had a summer program to maintain previously mastered skills. (Findings of Facts # 7) The Parent testified that the Student was also provided with a 75 hour summer program for the 2007-2008 school year.

12. Hearing officers have the authority to provide compensatory education as an equitable remedy for denial of FAPE. Since the United State Supreme Court decision of Burlington School Comm. v. Mass. Dept of Educ., 1984-85 EHLR 556:389, courts have consistently held that compensatory education ... is an appropriate remedy under IDEA. See, e.g., M.C. v. Central Regional School Dist., 81 F.3d 389 (3rd Cir. 1996); Pihl v. Massachusetts Department of Education, 9 F.3d 184 (1st Cir. 1993) Further according to the Office of Special Education Programs, United States Department of Education. IDEA grants due process hearing officers the authority to award compensatory education. Inquiry of Kohn , 17 EHLR 522 (OSEP 2/13/91). Compensatory education is limited to egregious denials of FAPE or egregious procedural violations. The awarding of compensatory education is clearly within the hearing officers' authority. The Student is clearly entitled to one year of compensatory education including ESY for the 2006-2007 school year and for the 2007-2008 school year which was from September 2007 to February 11, 2008. The compensatory education will be in the form of the Board paying for the services of a Board Certified Behavioral Analyst of the Parents choosing to create a Behavioral Support Program for the student and provide consultative support and supervision of the Behavioral Support Program for the Student for one school year including ESY Program.

FINAL DECISION AND ORDER:

1. The program offered to the Student for the 2006-2007 school year was not appropriate.
2. The program offered to the Student for the 2007-2008 school year was not appropriate.
3. The placement of the Student at CCCD for the 2007-2008 school year is appropriate and the LRE.
4. The Board shall reimburse the Parents for their unilateral placement of the Student at CCCD from February 11, 2008 to the end of the 2007-2008 school year.
5. The Board had provided the Student with an extended school year program for the 2007-2008 school year. (See *Conclusions of Law #11*)
6. The Board shall reimburse the Parents for the evaluation from CCSN.

7. Procedural violation was not in itself sufficient to deny the Student an appropriate program. (*See Conclusions of Law #5, 6 & 7*)
8. The Student shall receive compensatory education for the 2006-2007 school and 2007-2008 school year for the period from September 2007 to February 11, 2008. The compensatory education will be in the form of the Board paying for the services of a Board Certified Behavioral Analyst of the Parents choosing to create a Behavioral Support Program for the Student and provide consultative support and supervision of the Behavioral Support Program for the Student for one school year including ESY Program. The BCBA providing the Student's behavioral program will be of the Parents choosing wherever the Student is receiving his educational program.