

ISSUES:

1. Whether the Board offered an appropriate program for the 2000-2001 school year.
2. If not, whether the Parents' proposed out-of-district placement at a facility such as Eagle Hill-Southport is appropriate.

PROCEDURAL SUMMARY:

This hearing was requested on May 14, 2001. The hearing commenced on June 6, 2001, and continued on June 11, July 19, July 23 and July 25. The July hearing dates were scheduled after requests by counsel for the Parents and counsel for the Board to extend the mailing date of the decision based on an asserted need for additional hearing dates. The evidentiary portion of the hearing was closed on July 25.

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

FINDINGS OF FACT:

1. The Student was in sixth grade at a Board middle school during the 2000-2001 school year, and was eligible for special education services with the identification of Specific Learning Disability. (Testimony Mother, B-49, B-60).
2. In the second grade, the Student was initially identified with a specific learning disability due to the 22-point discrepancy between verbal and performance scores. (Testimony Mother, B-18) At that time, in January 1997, no goals and objectives were developed for the Student. (Testimony Mother, B-18) The Student was placed in a "consult" period, with no direct services. (Testimony Mother, B-18)
3. The Student continued to be identified as eligible for special education and related services in the third grade. (Testimony Mother, B-25) Again the student's services were listed as "consult" only, and no goals and objectives were developed for the Student in January 1998. (Testimony Mother, B-25) The Student's Individualized Education Program (hereinafter "IEP") included modifications for written assignments, homework assignments and the Connecticut Mastery Test. (Testimony Mother, B-25)

4. From the second grade to the present, the student has had asthma, which resulted in absences from school. (Testimony Mother, B-27) In February 1998, the Student's anxiety regarding reading assignments and math tests increased, and his absences due to asthma also increased. (Testimony Mother, B-27)
5. Throughout this time until the present, the Student has been absent many times, and has had to go to the nurse's office many times. (Testimony Mother, Ms. Groppuso) While the Board attempted to chart the number of times that the Student went to the nurse's office to determine if there was a pattern due to his anxiety, no particular charting was done, except as to the time of day he went to the nurse's office. (Testimony Ms. Michaud) The Board staff members did not attempt to determine whether the trips to the nurse were anxiety-related, only the time of day was charted. (Testimony Michaud) No successful behavior management plan was implemented for the Student's IEP to address the numerous trips to the nurse and the many absences the Student had. (Testimony Michaud, B-49, B-88)
6. At the Planning and Placement Team (hereinafter PPT) meeting in early 1999, the Student was assigned 3.75 service hours from the Resource Staff as part of his Individualized Education Program (hereinafter IEP). (Testimony Mother, B-33) This was the first time that Goals and Objectives were drafted for the Student's IEP. (Testimony Mother, B-33)
7. In January 2000, the PPT recommended that the Student be exited from special education services after the triennial review. (Testimony Mother, B-40, B-41) The Board members of the PPT told the Mother that if the Student just tried harder, he could do the work. (Testimony Mother) The Parents disagreed with the decision to exit the Student from special education services. (Testimony Mother, B-40-B-42)
8. At this time, the Student was consistently being told he was not trying by his teachers. (Testimony Mother) In January 2000, the Student's teacher required that the Student write a letter to his Parents regarding his poor performance on his homework. (Testimony Mother, P-22) The Student was told in front of the class that he was getting a D for his reading assignment, and that he must write a letter of apology to his parents about that. (Testimony Mother, P-22) The teacher graded his homework as the student "knows 0" and "wants to learn 0." (Testimony Mother, P-21) This theme that the student's deficits were a result of the student's choices continued through the end of the 2000-2001 school year. (Testimony Ms. Casey, Mother)
9. At this time, the Student began to vomit before school on a regular basis. (Testimony Mother) The Student's pediatrician completed tests, and concluded that the vomiting episodes were anxiety-related. (Testimony Mother) The vomiting situation reached a crisis level, and the Parent sought assistance from the School. (Testimony Mother) The Parent worked with the guidance counselor to meet with the Student about relaxation techniques, and the School staff suggested that the Student carry a bowl around with him in case he had to vomit. (Testimony Mother)
10. After the Board proposed that the Student should be exited from special education services, the Parents requested an independent evaluation of the Student, which was completed by Lynn Adams of the Yale University Child Student Center. (Testimony Mother, B-47)

11. Dr. Adams' test results concluded that the Student had a 27-point discrepancy between the Student's Broad Written Expression score on the Woodcock-Johnson and his Verbal IQ. (B-47) Dr. Adams' report also noted that the Student has a significant and very concerning weakness in higher-order problem solving and organization. (B-47) In addition, Dr. Adams' noted that the Student experienced anxiety and somatization which affects the Student's ability to attend school and profit from the educational setting. (B-47)

12. In June 2000, a PPT was convened which determined that the Student was eligible for special education services due to his specific learning disability identified after review of Dr. Adams' report. (Testimony Mother, B-47) The Student's IEP included 3.75 hours of services in the regular classroom, 0.7 hours per week of direct pull-out services in the resource room and 0.7 hours per week of counseling (Testimony Mother, B-49) No statement of the Student's present level of performance was included in the IEP, nor were any agreed upon benchmarks included. (Testimony Ms. Michaud, B-49)

13. At the beginning of the 2000-2001 school year, the Student told his mother that no one was helping him in the classroom. (Testimony Mother) The resource room teacher failed to provide the pullout services for the Student during the fall of the year. (Testimony Mother, Ms. Michaud, the resource room teacher) The resource room teacher, who was the Student's case manager, did not provide the pullout services, as it was an oversight of hers. (Testimony Ms. Michaud) The resource room teacher missed the fact that the Student was entitled to the pull-out services, because the listing of the pull-out service time was not listed on the first page of the PPT minutes, nor in the minutes themselves. (Testimony Ms. Michaud) The resource room teacher did not read the entire IEP, even though as case manager she was responsible for coordinating the delivery of the services to the Student, and despite the fact that the Parent had told her earlier in the fall that the Student was entitled to such services. (Testimony Ms. Michaud, Mother) At a PPT convened in December 2000, the Mother had to point out the page in the Student's IEP where the pullout hours were listed to the members of the PP, including the resource room teacher. (Testimony Mother) Subsequently, in January 2001, the Board then agreed to provide additional compensatory time to make up for the missed sessions of pullout time. (Testimony Mother, B-65)

14. At the December 2000 PPT, concerns regarding the Student's anxiety and stress were discussed. (Testimony Mother, B-60) The school was providing counseling at this time, but throughout the entire school year, the school psychologist who delivered these services was never able to draw the Student out so that he would discuss his anxieties with her. (Testimony Ms. Groppuso, school psychologist) The school psychologist felt she gave the Student a safe haven, but he could not speak candidly about his anxieties with her. (Testimony Groppuso) The school psychologist never performed a formal or informal evaluation of the Student, and never kept notes of the sessions. (Testimony Ms. Groppuso) She had the Student listen to relaxation tapes, but these tapes never helped the Student open up and she never saw the student apply the relaxation tools/techniques from the tapes in school. (Testimony Ms. Groppuso) Although the school psychologist increased the sessions for the Student to enable him to open up, he never opened up with her. (Testimony Ms. Groppuso) Board staff indicated that they didn't notice that

the Student experienced stress at school, but the Student was known to put a positive spin on issues, even though he was distressed. (Testimony Mother, Ms. Michaud, Ms. Groppuso, B-88)

15. At the January 4, 2001 PPT, the team recommended that the student be in a diagnostic placement. (Testimony Mother, B-65) The Board members of the team indicated that the diagnostic placement was to look at additional programs such as the use of assistive technology. (Testimony Mother, B-65) In addition, at this PPT, the counseling hours were increased to 1.4 hours per week. (Testimony Mother, Ms. Groppuso, B-65) The counseling hours were increased in October 2000, but the increase was not discussed in a PPT until January 2001. (Testimony Ms. Groppuso, B-65)

16. While the Parent consistently noted that an Assistive Technology program should be introduced at each PPT, it was marked "not applicable," including at the December 2000 PPT. (Testimony Mother, B-60) When the assistive technology evaluation was recommended at the January 4, 2001 PPT, the Parent did not sign a consent for the assistive technology evaluation, and was never informed about when the testing of the Student would take place. (Testimony Mother, B-65) The Mother was not contacted for the AT evaluation, although family input should be included in an assistive technology evaluation in accordance with the state Assistive Technology Guidelines. (B-69)

17. A PPT meeting was convened on January 29, 2001, to review the diagnostic placement. (Testimony Mother, B-75) At that time, the team recommended that a psychiatric evaluation be completed. (B-75)

18. The psychiatric evaluation, completed by Dorothy Stubbe, M.D. in February 2001, concluded that the Student had a diagnosis of Anxiety Disorder, NOS with a history of school phobia symptoms and a Disorder of Written Expression (Learning Disorder). (B-79) Dr. Stubbe made several educational recommendations in her report, including (a) a curriculum that addresses the Student's special academic needs, including work on the computer to help the Student gain improved skills in written expression, (b) an educational plan that addresses his difficulties with anxiety management, and (c) that the family and school maintain close collaboration as the Student is highly destabilized by conflict and lack of a concrete, unified set of expectations and plans. (B-79) The record does not reflect that the family and school were ever able to establish close collaboration as recommended in this evaluation, nor was there sufficient follow-up within the school on the collaboration for the Student's program. (Testimony Mother, Ms. Michaud, Ms. Casey, Mr. Civitello)

19. The diagnostic placement was reviewed at PPT meetings on February 12, March 16, and April 30, 2001. (B-78, B-80, B-86) The Parent did not know why the Student remained in a diagnostic placement for 115 days, from January 4, 2001 through April 30, 2001 when the diagnostic placement was terminated. (Testimony Mother, B-86) The Student's program from April 2001 through May 2002 was set at 8.4 hours of resource support, of which 3.5 hours per week were pull-out direct services; counseling of 1.4 hours per week; and home-school communication through the assignment pad. (B-86) Modifications included access to a computer with spell check, access to a quick reference list for spelling, oral tests and extra time

for written assignments and tests, no spelling penalty, no handwriting penalty, grading to reflect effort, and positive reinforcement for effort and participation.

20. Despite the lengthy diagnostic placement, no changes were made in the Goals and Objectives. (Testimony Mother, B-49, B-86) The Student's Goals and Objectives were not mastered by the completion of the diagnostic placement, but these same Goals were simply repeated for the next year. (B-49, B-86, B-88) Moreover, the counseling objectives were not met, except for the objective of listening to relaxation tapes (Testimony Mother, Groppuso) To master that objective, the Student merely had to listen to relaxation tapes. (Testimony Groppuso, Michaud) Despite the noted level of school-related anxiety in the evaluation of Dr. Stubbe, the number of hours of counseling was reduced for the 2001-2002 school year. (B-79, B-88)

21. The Student obtained passing grades for the 2000-2001 school year. (B-94) While the final grades were not modified, the grading of the work along the way was modified. (Testimony Ms. Casey) For example, spelling would not be taken into consideration in grading, and the grades would be modified to show effort. (Testimony Casey, B-94, B-49) Therefore, the grades did not accurately reflect progress. (Testimony Mother) In addition, the Board presented work samples to show progress in the Student's work, but the Board staff did not know whether the Student received help from a tutor or the Parent for these work samples. (Testimony Ms. Michaud, B-93)

22. During sixth grade, the Student did not meet Goal on any of the three areas of the Connecticut Mastery Test. (Testimony Mother, B-81) He scored below goal in Mathematics, well below goal in Writing and at intervention level for Reading. (Testimony Mother, B-81)

23. Adrienne G. Smaller, Ph.D., completed a psycho-educational evaluation of the Student in March 2001. (Testimony Dr. Smaller, P-18) Dr. Smaller noted that the Student performs academic tasks with a high level of anxiety. (Testimony Dr. Smaller, P-18) The Student's higher-order problem solving weakness is apparent in reading decoding, reading comprehension, listening comprehension, and in writing. (Testimony Dr. Smaller, P-18) Dr. Smaller noted that a striking result of her testing on the Wechsler Individual Achievement Test (WIAT) was the alarming significant regression in skills across the board from his previous evaluation in December 1999. (Testimony Dr. Smaller, P-18) Based on her evaluation, the Student has a significant learning disability in the area of written language, and a significant weakness in higher-order problem solving tasks, which is currently affecting all areas of his learning. (Testimony Dr. Smaller) The Student has strong innate ability and, therefore, he could get by in the early years at school based on what he hears. (Testimony Dr. Smaller) When the amount of written material increases as it has in the Student's current grade level, then the problems increase for the Student. (Testimony Dr. Smaller)

24. Dr. Smaller provided educational recommendations in her evaluation that included a need for a low ratio, so that the Student could be taught on a tutorial basis with a dialogue between teacher and student. (Testimony Dr. Smaller) In addition, Dr. Smaller noted that an individualized program for the Student must include addressing his anxiety and the self-esteem issues. (Testimony Dr. Smaller, P-18) Dr. Smaller listed detailed components of the proposed program for the Student, and concluded that Eagle Hill-Southport provides the comprehensive

program which meets the Student's educational and related emotional needs. (Testimony Dr. Smaller)

25. Elizabeth Hart, Ph.D., completed a neuropsychological evaluation of the Student in April 2001. Dr. Hart's evaluation confirmed the Student's diagnosis of Learning Disorder NOS (executive function; nonverbal) and a Reading Disorder. (Testimony Dr. Hart, P-19) Based on the testing results, Dr. Hart concluded that the Student has strength in rote verbal learning, but is not fully able to make use of the knowledge in a fluent and efficient manner in the classroom. (Testimony Dr. Hart, P-19) Ambiguous, vague and complex tasks are problematic for the Student. (Testimony Dr. Hart) In addition, mathematics with applied reasoning or with visual tasks would be a challenge for him. (Testimony Dr. Hart) Processing speed is also compromised for the Student. (Testimony Dr. Hart) It is safe to say that the Student's disability will impact him in the classroom in all of his classes. (Testimony Dr. Hart)

26. Consistent with other children with this type of profile, the Student has been more at risk to develop anxiety and depressive symptoms. (Testimony Dr. Hart) The Student's level of anxiety interferes with his academic performance. (Testimony Dr. Hart) The Student's anxiety results in task withdrawal or task refusal. (Testimony Dr. Hart) The Student feels overwhelmed, confused and frustrated due to the anxiety. (Testimony Dr. Hart) Motivation is not a problem for the student for the most part, but if he is asked to do what he perceives is beyond his capacity, he won't try. (Testimony Dr. Hart) In addition, the Student's anxiety leads to distraction because if he feels a task is challenging and complex, he will get distracted. (Testimony Dr. Hart) Due to these emotional issues, consistent reinforcement is necessary for the Student; he can not self-reinforce because he can not self-evaluate. (Testimony Dr. Hart)

27. Dr. Hart identified specific programming strategies and modifications that could be implemented for the Student including, for example, use of lecture notes and a word processor, and specific suggestions on writing skills, pre-reading, listening and organizational strategies. (Testimony Dr. Hart, P-19) Because the Student has a long history of documented weakness in the nonverbal area plus a decline in performance, Dr. Hart concluded that the Student must have a comprehensive program to meet his needs. (Testimony Dr. Hart) Dr. Hart recommended the program at Eagle Hill-Southport as it provides the immersion in language to learn to use it in an efficient manner which is an essential need for the Student. (Testimony Dr. Hart) It is most appropriate time for the Student to receive the type of programming at Eagle Hill prior to high school, so that the Student would be able to perform adequately in a mainstream high school setting in the future. (Testimony Dr. Hart)

28. Goals and objectives were set for the student in his IEP for the 2001-2002 school year (B-88) The Student's counseling hours were decreased, even though he didn't achieve any level of coping skills for his anxiety. (Testimony Ms. Groppuso, B-88) The counseling was changed to small group counseling, with time for one on one counseling added on an "as needed basis." (Testimony Ms. Groppuso, B-88) A note-taking goal was added at the request of the parent for the 2001-2002 school year. (Testimony Ms. Michaud, B-88) For the Academic/Cognitive Goals and Objectives, the Board restated the same goals and objectives of the 2000-2001 IEP, and made those Goals and Objectives for the proposed 2001-2002 IEP. (Testimony Ms. Michaud, B-88, B-49) No changes in the Goals and Objectives were made, even though the Student had not

achieved these goals in the previous year, and despite a review of the evaluations of Dr. Stubbe, Dr. Hart and Dr. Smaller, which set forth specific recommendations for the Student's program, recommendations which were not included in the Student's IEP. (Testimony Ms. Michaud, B-79, B-88, P-18, P-19)

CONCLUSIONS OF LAW:

1. The Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq.
2. The Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14. The Board has not met its burden in this case.
3. The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.
4. The requirement of a free appropriate public education is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. *Board of Education v. Rowley*, 458 U.S. at 203
5. The Student's IEP was not sufficiently drafted to comport with State and Federal regulations. It failed to include a behavior management plan, an essential element in this Student's IEP. 34 C.F.R. 300.346(a)(2)(i) The Student's behavior due to absences and nurse's office visits are inhibiting his academic progress and, therefore, a behavior management plan should have been implemented for his IEP. The IEP failed to include a statement of the child's present levels of educational performance and a statement of benchmarks related to meeting the child's needs. 34 C.F.R. Sec. 300.347 The Student's program for the 2000-2001 school year included a "diagnostic placement" for the student which lasted from January 4 to April 30, 2001, exceeding the 8 week duration limit set forth in the State regulations, and which failed to meet the specific requirements for a diagnostic placement. Conn. Agencies Regs. Section 10-76h-14(b)
6. The IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Hendrick Hudson v. Rowley* 458 U.S. at 204 When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational

benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* This standard, however, contemplates more than mere trivial advancement. *Id.*

7. The Student has made only trivial, de minimis advancement in this case. The blanket statement by the Board witnesses who asserted that the Student's program for the 2000-2001 and 2001-2002 years was appropriate is not supported by the record in this case. (Testimony Ms. Groppuso, Ms. Michaud, Mr. Civitello) Furthermore, the Board presented no witnesses other than Board employees to support this assertion. The Student's program was simply not appropriate. No goals were mastered, but instead of revising the goals and objectives to more particularly focus on the individualized needs of the Student, the goals and objectives were simply repeated for the next year. The Student made no genuine progress on the social/emotional goals, and is still inhibited in his educational progress by his high level of anxiety. The IEP did not appropriately address the social/emotional issues, and was not modified when no progress was made. Rather, the proposed counseling hours for the 2001-2002 school year were reduced. The Student achieved passing marks, but these grades were based on modifications to show effort. Thus, the grades cannot be relied upon to show that the Student is progressing. Educational benefit contemplates more than mere trivial advancement that the Student has made and, therefore, the Board's program for the Student is inappropriate.

8. When it is determined that the Board's program is inappropriate, the parent is entitled to reimbursement if the parent's private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The Board has asserted that the Parents' proposed placement is too restrictive. As to the restrictive nature of Eagle Hill, the parents seeking an alternative placement are not subject to the same mainstreaming requirements as a school board. *M.S. ex rel S.S. v. Board of Education of the City of Yonkers*, 33 IDELR 183 (2nd Cir. 2000), citing *Warren G. v. Cumberland County School District*, 190 F. 3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect) Under the appropriate standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), citing *Florence County School District Four v. Carter*, 501 U.S. 7 (1993) Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education. *Id.* Under the Board's proposed IEP for the 2001-2002 school year, the Student will not receive such an appropriate education.

9. The Parents have articulated a proper placement for the Student at Eagle Hill-Southport, which is supported by the testimony and evaluations of Dr. Hart and Dr. Smaller. This comprehensive program meets the Student's educational and related emotional needs as it provides the immersion in language to learn to use it in an efficient manner. It is the appropriate time for the Student to receive the type of programming at Eagle Hill prior to high school, so that the Student would be able to perform adequately in a mainstream high school setting in the future. When it is determined that a private placement desired by the parents is proper under IDEA, and that the IEP with placement in a program at the public school is inappropriate, it is "clear beyond cavil" that "appropriate" relief would include a direction that the school official develop and implement at public expense an IEP placing the child in the private school.

Burlington School Committee, 471 U.S. at 369-370. Therefore, the Board is directed to develop and implement at public expense an IEP placing the child in Eagle Hill.

10. The final issue is the time frame for this final decision. The issues set forth at the first day of the hearing, and articulated in the submission from the Parents' counsel were: (a) Whether the Board offered an appropriate program for the 2000-2001 school year and, (b) if not, whether the parents' proposed out of district placement at a facility such as Eagle Hill-Southport is appropriate. The issues articulated did not include directly address the appropriateness of the proposed program offered by the Board for the 2001-2002 school year. However, as drafted, the parents' request for out of district placement could reasonably be construed to apply to the 2000-2001 school year, as well as the 2001-2002 school year. As the evidence supported a continued request by the parents for placement at Eagle Hill-Southport at the PPTs in the Spring of 2001 and both parties addressed the Board's proposed program for the 2001-2002 school year, the issue of placement at Eagle Hill-Southport for the 2001-2002 school year is appropriately before this hearing.

FINAL DECISION AND ORDER:

1. The Board did not offer an appropriate program for the Student for the 2000-2001 and the 2001-2002 school years.
2. The Parents' proposed placement at Eagle Hill-Southport is appropriate.
3. The Board is responsible for the cost of the Student's placement at Eagle Hill-Southport for the 2001-2002 school year.