

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

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Appearing before: Attorney Patricia M. Strong, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Did the Board fail to provide an appropriate program and placement for the student to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the summer of 2001?
2. Did the Board fail to provide an appropriate program and placement for the student to receive a FAPE in the LRE for the 2001-02 school year?
3. Did the Board fail to provide an appropriate program and placement for the student to receive a FAPE in the LRE for the summer of 2002?

**PROCEDURAL HISTORY:**

The Parents' attorney filed the hearing request on June 14, 2002. Hearing Officer (hereinafter HO) Exhibit 1. A prehearing conference was held on July 2, at which time hearing dates were selected at the mutual convenience of the parties. The hearing dates were July 26, 31 and August 2, 2002. The hearing was cancelled for July 31 at the request of the Parents' attorney with consent of the Board's attorney. Additional hearing dates were agreed on for September 12 and October 2. The hearing commenced on July 26, at which time the Hearing Officer heard the Parents' request to be represented by a New York attorney and the Board's objection to that request. After argument from both parties, the Hearing Officer granted the request of local counsel, Atty. Annemette Schmid, for the appearance of Atty. Gary Mayerson of the New York bar to represent the Parents pro hac vice. Local counsel or an attorney admitted to the Connecticut bar was to be present at the hearings and to sign pleadings. Atty. Schmid and Atty. Suzanne D. Koetsch of the local law firm of Harris & Harris and/or Atty. Amanda Oren, a member of the Connecticut bar, were present during all proceedings. Atty. Oren co-signed the final brief for the Parents. The Board's objection was overruled. The parties filed exhibits labeled P1 through P36 for the Parents and B1 through B47 for the Board, which were entered as full exhibits on the first day of the hearing. The Parents also filed several three-ring binders of documents, which were labeled Program Data Vol. I and Vol. II and Financial Reimbursement documents. These were later admitted as Exhibits B48 (Program Data Vol. II) and B49 (Program Data Vol. I); P37 (Financial Information) and P38 (Financial Summary & Checks). On the last hearing date, the Board offered a 17-page document entitled the Ethical Principles of Psychologists and Code of Conduct, which they marked as Exhibit B48. It was accepted without objection from the Parents. The record, therefore, contains two exhibits labeled B48.

The Parents presented testimony from Nancy Schwartz, Ph.D. in speech, on July 26. Keith Amerson of the Center for Children with Autism and Related Disorders (CARD) testified on August 2 and September 12. The October 2 and 18 hearing dates were cancelled because of the Hearing Officer's medical leave. Additional hearing dates were scheduled on October 25 and 28, November 18 and 25, December 3, 9 and 11. October 25 was cancelled because of the unavailability of the Board representative. December 11 was cancelled because the hearing was completed on the eighth day, December 9. On October 28, the student's mother testified. The Parents then rested their case. The Board presented its case on November 18 with testimony of William Horn, Ph.D., school psychologist, and Rosemary Callahan, speech and language pathologist with the school district. Ms. Callahan completed her testimony on November 25. Suzanne Merkel, the Board's preschool program administrator, began testimony on November 25 and completed her testimony on December 3. Lori Mancini, classroom teacher at Millbank School began testimony on December 3 and completed testimony on December 9. Patricia Morahan, Ph.D., special education, and a special education teacher in the district, testified on December 9. The Board rested its case. The Parents offered rebuttal testimony from the student's mother.

At the conclusion of the hearing, the Parties requested until January 16, 2003 to file simultaneous briefs, so that they could obtain transcripts to assist them. The Hearing Officer granted the request and set the decision deadline for February 14. The parties have filed proposed findings of fact and conclusions of law. The Parents also included a legal brief with case citations in support of their legal claims. The deadline was extended to February 28 by the Hearing Officer because of the need for additional time to complete the decision.

**SUMMARY:**

The student is a five-year-old with special needs. He received services in the Birth-to-Three program. He attended the Birth-to-Three preschool at the YWCA. At the same time he attended the St. Paul's Day School preschool program. The Board classified him as eligible for special education and related services in April 2000. Exhibit B8. The exceptionality was listed as Developmental Delay. *Id.* The Town of Greenwich paid for an aide in the Birth-to-Three program, which they continued to fund through August 2000. At that time the student (hereinafter referred to as N. or the Student) remained in St. Paul's Nursery School for the 2000-01 school year and the Summer 2001. The Parents are not seeking reimbursement for the 2000-01 school year, but they are for the Summer 2001. St. Paul's is a mainstream preschool for typically developing children. The program offered by the Board was the Early Childhood Special Education class. In September 2001, N. began attending the preschool program at Christ Church Nursery School, a mainstream preschool for ages two to five. The Parents provided an aide trained in Applied Behavior Analysis (ABA) for N.'s support at the preschool. He has never attended any public school programs offered by the Board. The Board has never done a comprehensive evaluation of the student. The Parents have provided the Board with evaluations of private service providers. The Parents are not seeking reimbursement for the private school tuition, but they seek reimbursement for the 1:1 aide, the speech and language therapy, occupational therapy and the ABA therapy at home. The costs are summarized in Exhibits P27 and P38. They claim that the Board's offer of the Early Childhood Special Education class did not meet the requirements of the IDEA in that it did not offer a FAPE in the LRE. The Board claims that the Parents did not raise these issues at a PPT meeting, that the Parents have not met the burden to prove that the services they provided are appropriate and that to the extent that the Board is required by state regulation to prove its program was appropriate, that such regulation is "improper and/or unconstitutional rulemaking." Board's Statement of Issues. The Board also claims that it is not required to offer a "regular education" preschool program. The Board further claimed at the hearing that its preschool program was equivalent to a mainstream education program.

The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record.

**FINDINGS OF FACT:**

1. The student is currently 5 years old (DOB 5/9/97) and has been enrolled in mainstream preschool settings since age two. (Testimony of Mother and Exhibit B-1)
2. N. received a comprehensive neurodevelopmental evaluation at the McCarton Center for Developmental Pediatrics at the Albert Einstein Medical Center in New York in January and February 2000. The overall test results on the Bayley-II Mental Scale showed cognitive functioning within normal limits with a mental age equivalent of 2 years 5 months. The Motor Scale was within normal limits with a developmental age equivalent of 2 years 9 months. The summary indicated that N. is a child with speech and language delays. The diagnosis was verbal apraxia, motor planning deficit (motor apraxia) and speech language delay. The report recommended speech/language therapy 3 times for 25 minutes weekly 1:1 with Dr. Nancy Schwartz, occupational therapy 2 times for 45 minutes weekly. The educational placement was listed in the alternative, one at Dundee school with an integrated classroom and the other the mainstream setting with a 1:1 aide. (Exhibits B-2; P-25.) The earlier evaluation in April 1999 was not included in the record.
3. In July 2001, Rosalie Greenbaum, Ph.D., gave N. an extensive neuropsychological evaluation. Dr. Greenbaum interviewed the Parents in June and August 2001 and issued her report on August 13, 2001. (Exhibits B-24 and P-19.) Dr. Greenbaum's report recites a complete history of N. from birth to the time of the evaluation, age 4 one month. Dr. Greenbaum administered the Kaufman Assessment Battery for Children (K-ABC). The scores and the national percentiles on the Global Scales were:

Sequential Processing	102	55
Simultaneous Processing	105	63
Mental Processing Composite (MPC)	104	61
Achievement	100	50
Nonverbal	111	77

She concluded that all global scores were solidly in the average range with no statistically significant strengths or weaknesses. Her report details the subtests and difficulties N. had with certain aspects of the testing such as understanding directions and maintaining attention. Dr. Greenbaum emphasized that N. needs extensive structure and support in order to display the capacities measured on the tests. She concluded that N. presented with three major areas of concern, which most closely fit the diagnosis of PDD-NOS: "1) Receptive and expressive language difficulties, including challenged capacities for abstract verbal reasoning; 2) Difficulties in executive processing; and 3) Social Disabilities, including areas of self-absorbed preoccupation." She made a detailed series of educational recommendations, prefaced by the following:

[N.] requires a highly structured preschool program in a small group mainstream setting. He will require the

services of a dedicated one-on-one aide who has ample training in working with children with language and executive dysfunction. However, a mainstream setting will enable him to be with typical children and, given his cognitive strengths and his capacity to learn content, to be exposed to an educational program that will maximize his potential. The school program should be supplemented with both language services and other interventions to help [N.] achieve control over his regulatory (or executive) difficulties as these are manifest both at home and in school.

4. In October 2001 Dr. McCarton conducted an annual evaluation of N. She stated:

[N.] is a 4 year 5 month old boy whom I have followed in terms of his development since May 1999 (2years of age). Historically [N.] has presented with a variety of behaviors. His parents reported loss of words once mastered. Initially, this evolved further into receptive language delay, verbal apraxia, limited eye contact, little social interaction with his peers, and play skills lacking in imaginative content. These behaviors are characteristic of a child with a Pervasive Developmental Disorder (PDD). This impacts a child's executive functioning and a wide range of abilities across virtually all domains.

[N.] has had the benefit of a comprehensive intervention program over the past few years. He has made steady progress. However, PDD is a lifelong disability and although improvement in behaviors can be brought out through intervention, the intrinsic neurologic lesions remain.

(Exhibit P-15.) She recommended that: “[N.] should attend school in a mainstream setting with an ‘appropriate’ full-time aide. He has at least average intelligence and needs both the academic stimulation of a mainstream nursery school and the social and language stimulation of typical peers.” She also recommended a home program of 15 to 20 hours per week of 1:1 ABA therapy, three 60-minute sessions of speech/language therapy with Dr. Schwartz, two 60-minute sessions weekly of occupational therapy with Marie Ossi and continued one-hour weekly aquatic therapy. She also stated her complete agreement with the evaluation done by Dr. Greenbaum. Id. In April 2002 Dr. McCarton wrote a letter detailing her opinion that N. needs a full 50-week therapeutic program of intervention in order to prevent regression. His next annual evaluation was to be done in October 2002. (Exhibits B-42 and P-34.) Dr. McCarton has visited the Millbank School program and did not think it was appropriate for N. (Testimony of Mother)

5. Nancy Schwartz, Ph.D. in speech, is an expert in the field of speech and language disorders. She has more than 20 years experience working with children. Currently 95% of her caseload is children on the PDD (Pervasive Developmental Disorder) continuum or neurological impairment. (Exhibit P-35 and Testimony of Dr. Schwartz)
6. Dr. Schwartz provides individual therapies for children and also consultative services to various school districts. These include evaluations of children. She focuses on the whole child, emphasizing generalization of skills. Children on the PDD continuum have splinter skills, which is an unusual ability to achieve in one area and very different abilities in others. They demonstrate an over-reliance on rote skills. She has worked with approximately 200 children with PDD, not including those she has evaluated. These children do not present in the same way. Id.
7. Dr. Schwartz provides workshops for teachers, observes and coordinates services for specific children and offers opinions on the appropriateness of programs for children. She has testified in due process proceedings. She is familiar with behavior intervention strategies, including ABA, which many children she works with are using. She coordinates the teaching of language development components with children's ABA providers. She has worked with 50-75 children to support them in mainstream classes. There is an extreme need for coordination of service providers. Dr. Schwartz has conducted in service workshops in Fairfield, Waterbury and Stamford, among others. She is an expert on assessment, evaluation and testing of children on the PDD or autism spectrum, as well mainstreaming these children. Id.
8. Dr. Schwartz began working with N. in August 1999 for verbal apraxia. This is a neurological disorder where there is an inability to motor plan for speech. She evaluated N. by reviewing videos of him at home and in a speech therapy session and conducted two direct intervention sessions with N. N. was not talking at 2 years 3 months. He could not imitate sounds and therefore could not be formally tested. In typically developing children of that age there is a range of two-word to five-six-word sentences. He exhibited stereotypy, which is an interfering behavior involving repetitive movements or sounds, which have no function other than pleasing the child. Id. and Exhibit P24A.
9. In June 2000 Dr. Schwartz conducted a second evaluation of N. His rate of progress was very fast. He could produce most sounds at age appropriate levels. At 3 years one month, he was at the 2 years 6 month level in expressive language and at the 2 years 7 month level in receptive language. N.'s therapy began to focus on those two areas as well as behavioral patterns that interfere with his ability to respond to language and interact with others. Dr. Schwartz concluded that N. needed support in four areas: language/speech, behavioral intervention, occupational therapy to address motor planning needs and sensory needs and social interaction skills addressed by a facilitator in a preschool and play date setting to teach N. to interact with peers. N. was in the Birth-to-Three program. (Id. and Exhibit P-24.)

10. In May 2001 Dr. Schwartz completed a progress report for N. Since he had begun therapy his focus was on eliminating speech apraxia. As of May 2001 speech apraxia was no longer an issue. N.'s speech was intelligible 90% of the time. At age 4 his auditory comprehension tested at age 3 years 10 months. His expressive communication was at 3 years 11 months. His preschool language scale was 3. She described his areas of strengths and weaknesses and concluded that N. had made strong progress. Formal test measures indicate close to age appropriate performance, however, his language usage does not match his peers. (Id. and Exhibit P23)
11. N. began ABA therapy with CARD in the summer of 2000. (Testimony of Keith Amerson and Mother) CARD provides N. with a home-based program of 1:1 ABA instruction and a 1:1 support aide at Christ Church nursery school. Previously CARD provided a 1:1 aide at St. Paul's nursery school. Mr. Amerson provides some direct services to N. and is responsible for supervising the therapists and attending team meetings. Mr. Amerson has provided services to hundreds of children with autism spectrum disorders throughout the United States and internationally. He has an M.S. in special education and is a certified special education teacher in the state of New York. (Exhibit P-36) He and the therapists working with N. have extensive training in ABA techniques. CARD consults to school districts in the state of Connecticut and has contracts with Weston, Wilton, Brookfield and Newtown among others. CARD is willing to work with the Board in providing services and consultation with regard to N. CARD has experience with providing support to children in mainstream settings. The aides are trained to act as shadows for the student in the mainstream using a prompt hierarchy, from physical (hand-over-hand), gestural and verbal. Some can be as subtle as looking at a child a certain way. CARD requires staff members to have at least 6 to 12 months of training applying the principles in a 1:1 setting or in a home setting before they are placed in a school environment. In addition to team meetings, logbooks of data are kept on a daily basis. Regular assessment of data is done in order to assess progress and look for trends. Mr. Amerson talks to N.'s teachers, the school's director, observes N. in the classroom and interacts with the aide to ensure that the correct targets were selected, the correct techniques were being used, and progress was being made. (Testimony of Amerson)
12. There is no separate IEP for the extended school year (ESY) program for the summer of 2001 from the Board. There was an IEP offered in 2000-01 at PPT meetings held on April 18, June 23 and September 20, 2000. (Exhibits P-6-P-8 and B-8, B-11, B-13) The IEP did not indicate that an ESY program is required for the student, however, the September PPT summary indicates the dates of service from September 14, 2000 through September 14, 2001. (Exhibit B-13) From the testimony it appeared that there was a summer program at Dundee School which had breaks between the end of the 2000-01 school year and the beginning of the 2001-02 school year. The Mother testified that she was told the summer program would be at Dundee School in a self-contained classroom. She visited the school, but did not think it was appropriate for N. to receive ABA instruction there. She was told ABA instruction would not be provided anywhere but at Dundee School. The speech and occupational therapy services were available to N. separately from the Dundee School program.

The Mother testified that she met with the speech therapist, but it wasn't clear if she had experience with apraxia and that N. was doing very well with Dr. Schwartz. There were speech therapy for one session of 30 minutes per week and occupational therapy services for two sessions of 30 minutes per week offered from September 14, 2000 through September 14, 2001. The Parents provided a summer camp at St. Paul's nursery school and home services from CARD, as well as the speech therapy from Dr. Schwartz and occupational therapy from Ms. Ossi for the summer of 2001. (Testimony of Mother)

13. In the 2000-01 school year, the Mother was interested in the occupational therapy, but the Board did not have a therapist available until November 2000. An appointment wasn't available until January 2001. At that time the Mother was told that services were not available in the morning. The only time was 3:00 p.m. when N. would be just finishing the St. Paul's nursery school program. She also felt the services were too late in the day for N., since he had a home program in the morning and nursery school until 2:30. Therefore the occupational therapy services were not utilized from the Board. (Testimony of Mother) On June 20, 2000 the IEP was revised to add an additional session of speech therapy for 30 minutes and a special education consultation to the nursery school. The consultation was done during the school year by Dr. Patricia Morahan. She did not write any reports of her observations or consultations, nor did she meet with N.'s Parents or therapists during the consultation period. She did occasionally speak to N.'s teacher at the nursery school. (Testimony of Dr. Morahan, Mother and Mr. Amerson) It is undisputed that N. requires an extended school year program to meet his educational needs and prevent regression. (Exhibits P-33 and P-34)
14. On June 7, 2001 the PPT met to develop an IEP for the 2001-02 school year. (Exhibits B-16 and P-5) The team again recommended the early childhood program, which was relocating to the Millbank School, and speech and occupational therapy for two sessions of 30 minutes for a diagnostic period followed by the development of a new IEP. The Parents' requests for an aide for N. in the mainstream private preschool and reimbursement for private therapy were denied. Id. The services offered were to commence September 30, 2001 and end June 21, 2002. Nothing is mentioned in the documents as to any additional services for the summer of 2001. The Board did not provide the appropriate level of services in the ESY program for the summer of 2001. Those present at the PPT meeting were the Parents, Dr. Morahan, Rosemary Callahan, and Joanna Dunne, school psychologist. There was no regular education teacher or one of N.'s private preschool teachers. Id. Although the testimony indicated that there were records reviewed by the school-based team members, including N.'s Birth-to-Three records, the McCarton Report and progress reports from Dr. Schwartz, there is nothing on the IEP document to indicate this. Id. Ms. Callahan also testified that she had observed N. three times in his private settings as part of her duties in screening children for communication difficulties.
15. The Parents, on the recommendations of Dr. Schwartz and Mr. Amerson, placed N. at Christ Church nursery school in September 2001 because it had a more structured



setting. The Mother reviewed 20 preschool programs in the area before selecting Christ Church. There were all typical children in the school, which recommended the afternoon session for N. because it was quieter. There were three teachers in the class. N. did very well in the class. He attended 2 and ½ hours per day, for a total of 12 and ½ per week. This year he is attending Christ Church for 19 ½ to 20 hours per week. (Testimony of Mother)

16. In September 2001 another progress report was done by Dr. Schwartz. N. continued to make progress. His rote memory gave him superficial skills, but he needed to generalize and augment the content. N.'s rote memory skills can be mistaken for learned skills. (Testimony of Dr. Schwartz and Exhibit P-18)
17. On October 25, 2001, the PPT met to review evaluations. Those present were Suzanne Merkel, Ms. Callahan, Dr. Morahan, Mary Forde, Director of Special Education, the Parents and attorneys for both parties. The Parents and their professionals were to visit and observe the program at Millbank School, which is where the early childhood program had moved, and the Board staff would visit and observe Christ Church nursery school. In addition, the Board would conduct an occupational therapy evaluation. The Parents provided progress reports from CARD, Dr. Schwartz and Marie Ossi, N.'s private OT. The team agreed to reconvene on November 8 to discuss a revised IEP. (Exhibit B-29)
18. In November 2001 Dr. Schwartz recommended IEP goals for N. She has experience in developing goals and objectives and working with PPTs. No one from the Board asked to speak with Dr. Schwartz or observe any sessions with N. She has seen no evidence that the Board has done the kind of analysis she has done for assessing N.'s needs. (Id. and Exhibit P-10)
19. On November 9, 2001 a PPT meeting was held for the purpose of revising the IEP goals. Those present were Ms. Merkel, Ms. Callahan, Dr. Morahan, Lori Mancini, special education teacher at Millbank, the Parents and Mr. Amerson. (Exhibit B-35) Only Goal #1 was revised for clarification purposes. Speech and OT services were expanded to three sessions of 30 minutes weekly. The Parents' requests for additional goals and objectives and funding for an aide and private therapy were denied again. The team reviewed occupational therapy reports from Ms. Ossi and the Board's staff OT, Jessica Griffing. (Exhibits B-17, B-22 and B-34) The 2001-02 IEP was extended to provide services until November 19, 2002. Services for the ESY program for summer 2002 were not separately listed. No ABA was noted on the IEP. (Exhibit B-35) On the page of the form concerning justification for removal from general education, the box "other" is checked with the comment: "The preschool program is integrated." The paragraph regarding description of the extent to which the student will not participate in general education is checked "Not applicable/student fully participates." Id. at 14.
20. The IEP goals relating to speech were not appropriate or sufficient in Dr. Schwartz' opinion. They did not deal with verbal reasoning, thinking skills, theory of mind,

comprehensive language. They left out entire domains recommended by Dr. Schwartz. (Testimony of Dr. Schwartz) Thirty minute speech therapy sessions were not long enough in Dr. Schwartz's opinion considering N.'s distractibility, behavioral needs and social and language needs. Id.

21. The program offered by the Board was in the Millbank School, a public school for children with special needs. The classroom was small, there were lots of children and staff and the room was very visually and auditorially stimulating. It was an integrated program, with approximately six disabled children and ten typical children. There are one teacher and three aides in the classroom. It was not an appropriate setting for N. It is a more restrictive environment than Christ Church Nursery School where N. is mainstreamed with typical peers in a large classroom with fewer students (14) and more teachers (3) and a quieter tone. N. tends to model and imitate inappropriate behavior, which is more likely in the Millbank classroom. Id.; (Exhibits P-12 and P-28 and Testimony of K. Amerson) Individual instruction is given in an area with partitions on three sides in the classroom at Millbank. The partitions do not reach the ceiling, one side is open and there is no way to keep out noise and other distractions. (Id. and Testimony of Mother)
22. Dr. Horn spends four days per week in the preschool program for the Board and one day system-wide. He has postgraduate training in ABA therapy. He explained that the early childhood program has been an integrated program since 1990. Prior to that time it was segregated for children in special education only. Now the program has eight classrooms with 50-60 special needs children and typical children to bring the ratio to 60% typical to 40% special needs children. The program is a center-based program providing a range of services for preschool children with certified staff. Three years ago the Board hired Kate Mahoney to do ABA therapy. She performs direct 1:1 instruction, direct services for ABA and works with the teachers and aides in terms of incidental teaching. She covers all eight classrooms. The Board provides ABA therapy for children if they require it. The maximum provided is 15 hours per week. The ABA instruction is done in a partitioned area of the classroom. He did not know if N. would receive ABA instruction or how much he would receive. Dr. Horn has never met N., however, he reviewed the reports in the record from Dr. McCarton and Dr. Greenbaum. Dr. Horn did not attend any of N.'s PPT meetings. The classroom teacher who would have had N. in her class is Lauri Mancini. The Board can provide children with mainstream preschool programs in private settings. Dr. Horn did not know the financial arrangements. (Testimony of Dr. Horn)
23. Ms. Callahan is a speech and language pathologist who developed N.'s IEP goals and objectives for the 2001-02 year with Dr. Morahan and Joanna Dunn, a special education teacher. The school-based team reviewed Dr. Schwartz's and Dr. McCarton's reports. They did not put items in the goals and objectives, which were already part of the preschool curriculum. Ms. Callahan wrote the speech and language goals with Dr. Schwartz's draft goals and objectives in mind. Ms. Callahan did not include those she thought were "too high-functioning" for N. or which were already included in the curriculum. (Testimony of Ms. Callahan; Exhibits P-10; B-

- 37) The only setting considered by the team was the integrated preschool program at Millbank. The Parents requested a mainstream setting for N. There was no regular education teacher at any of the PPT meetings for N. because regular education is not a mandated program for preschool, so the Board does not provide regular education teachers. (Testimony of Ms. Callahan) Ms. Merkel is the program administrator of the preschool program. She believed N. would do better in the integrated classroom at Millbank than in a mainstream setting. The team considered the reports from Mr. Amerson, Dr. Schwartz, Dr. Greenbaum and Dr. McCarton and made their own recommendation for Millbank. She agreed that the LRE requires mainstreaming for children, including N., to the maximum extent possible. The team agreed that N. was making progress in the mainstream private preschool setting.
24. Ms. Mancini testified regarding the schedule in her class and N.'s proposed schedule. (Exhibit B-35 at 18-19) She testified that the typical children were harder to redirect than those with PDD. She felt she could handle N.'s behavior problems if she knew what they were. She has been trained to do a functional behavior assessment by Dr. Horn, but she's never done one in her five years of teaching. There are no behavior interventions in N.'s IEP.
25. Dr. Callahan agreed that N. did well in the mainstream preschool during the 2000-01 school when she observed him weekly. She spoke to his classroom teacher and his aide. He needed support of the aide to be in the community preschool. His aide did a good job. She felt that the team needed to have N. in their program before doing a comprehensive IEP. (Testimony of Dr. Callahan)
26. N.'s program was weighed more heavily toward discrete trials when he was three to four years old. Over time N.'s ABA intervention has become more naturalized because the issue has changed to functionality of skills across environments. The core ABA intervention approaches used with N. are prompting, chain skills discrete trials, incidental teaching and modeling. N. has made progress with CARD and Mr. Amerson's support. He continues to need their support. N. receives 10 to 15 hours per week at home and 12.5 hours per week at school. In the summer program, N. received 10 to 15 hours per week of ABA at home and a CARD support aide at the summer camp for typical children. Mr. Amerson would not recommend a special education preschool for N. in the summer of 2002 because his main deficit areas that need to be addressed are his social interaction with peers, attending to his environment, reasoning, ability to predict and infer. *Id.* N. has made progress on the goals outlined for him by CARD. His progress is summarized in reports, which are in the record. (Exhibits P-9, P-31 and P-32)
27. N.'s biggest remaining deficits are behavioral needs to eliminate or reduce his distractibility, executive function needs, extended language needs, social skills with mainstream peers, to learn flexibility in exchange and understand others' perspectives, to shift his perspective from peer to peer and to cease copying peers. There were no interfering behaviors observed at Christ Church. Dr. Schwartz and

Mr. Amerson did observe some hand-flapping and other interfering behaviors at Millbank. Id.

28. N. has received OT from Marie Ossi since June 2000 for two sessions per week of one hour. (Testimony of Mother, Exhibits B-17, P-20) Ms. Ossi did not testify, but her reports were received into the record at B-38; P-11 (goals and objectives for 2001-02), B-22; P-17 (description of services October 2001), B-17; P-20 (occupational therapy report October 2001), P-21 (description of services June 2001), and B-40; P-30 (progress note for sessions from September 2001 to April 2002). In her eight-page occupational therapy report dated June 30, 2001, Ms. Ossi found N. to have "major issues with the integrity of his foundation skills and sensory integrative skills. His lack of postural stability and his lack of control at the head and neck, and the shoulder level prevent him from remaining stable and focused for an appropriate amount of time for his age. . . . There is an important lack of bilateral integration at all trunk, upper and lower extremities, as well as at the visual levels. . . . Throughout the day an excessive amount of stress is accumulated in his body and he may become overwhelmed." N. was tested with the Peabody Developmental Motor Scales-2 (PDMS-2) with the following results:

	Raw Scores	Age Equivalent (In Months)	%ile
Stationary	40	32	5
Locomotion	132	34	9
Object Manipulation	17	22	5
Grasping	44	36	5
Visuo-motor Integration	116	38	9

(Exhibit B-17; P-20.) Twice weekly one-hour sessions were recommended. Id. In April 2002 Ms. Ossi reported N. had made great progress from September 2001 and had particular success with grapho-motor skills, learning to trace letters in upper and lower case using a mature tripod grasp. (Exhibits B-40; P-30)

29. On April 24, 2002, a PPT was held at the Parents' request to discuss the summer 2002 program. Parents asked for a 1:1 aide at Christ Church summer program, which was denied. Exhibit B44. The document states that: "[N.] is eligible for ESY services, as per the current IEP. Team recommended that [N.] attend the Greenwich Public Schools Preschool Summer Program. Related services, as per current IEP, remain in effect for summer program." Id. at 3. On June 24, 2002 the PPT met to plan for the 2002-03 school year and to develop an IEP. B45. This school year is not involved in this due process hearing, and the Hearing Officer declines to make any findings regarding it.

30. In the 2001-02 school year, including the ESY of summer 2001 and summer 2002, N. required 12-15 hours per week of ABA therapy. The IEPs offered by the Board for those periods of time did not contain any 1:1 ABA therapy. N. required the support of an ABA-trained aide in order to participate in the mainstream nursery school. The IEPs offered by the Board did not provide for an ABA-trained aide or for a

mainstream program. The integrated classroom at Millbank is a more restrictive environment than the mainstream class at St. Paul's or Christ Church nursery schools. The IEPs offered by the Board did not provide sufficient hours for speech and language therapy and occupational therapy. N. required three sessions of 45 minutes and two one-hour sessions respectively.

31. The program provided by the Parents for N., including 12-15 hours per week of 1:1 ABA therapy, the 1:1 aide at St. Paul's for the 2001 summer program and at Christ Church for the 2001-02 school year and ESY summer 2002 programs was appropriate and provided educational benefits to N. (Exhibits P-31 and P-32; Testimony of Mother and Mr. Amerson) These services were provided by Mr. Amerson and CARD staff, who were qualified to perform competent ABA therapy services. (Exhibit P-36 and Testimony of Mr. Amerson) The occupational therapy provided by Ms. Ossi and the speech and language therapy provided by Dr. Schwartz during those time periods was appropriate. N. made progress with occupational therapy. (Exhibit P-30) He made progress in speech therapy. (Exhibit P-29) Although the Board had offered related services as a separate service plan to the IEP, they were offered at inconvenient times and not in sufficient quantity for N.'s needs.

#### **CONCLUSIONS OF LAW:**

1. The Parties agree that the student qualifies for and is entitled to receive a free and appropriate public education ("FAPE") with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq. The Parents contend that N. is a child with autism. The Board contends that the exceptionality is developmental delay. A "child with a disability" is defined under the federal law as "a child evaluated in accordance with Sec. 300.530-300.536 as having . . . autism . . . and who, by reason thereof, needs special education and related services." 34 C.F.R. 300.7(a)(1). Section 300.7(b) provides:

The term child with a disability for children aged 3 through 9 may, at the discretion of the State and LEA and in accordance with Section 300.313, include a child--

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(2) Who, by reason thereof, needs special education and related services.

Section 300.7(c)(1)(i) defines autism in relevant part:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. . . .

N. is a child whose disabilities fall on the autism spectrum. N.'s diagnosis fits the classification of "autism." Report of the Connecticut Task Force on Issues for the Education of Children with Autism at 16-24. N.'s diagnosis is also consistent with Section 300.7(b) since he is between the relevant ages of 3 and 9 and has developmental delays in several of the areas listed in the definition. According to Dr. McCarton, N. has a lifelong disability, therefore, it is more appropriate for the classification to be "autism."

2. The Board's statement of issues regarding the burden of proof was not briefed, however, the law in this Circuit is clear. The Board has the burden of proof on the appropriateness of the program for 2001-02, as well as the Summer 2001 and Summer 2002 programs. Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998). Conn. State Regs. Section 10-76h-14. The standard for determining whether FAPE has been provided is set forth in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have been met and second is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-207. The Board must establish these by a preponderance of the evidence. Walczak v. Florida Union Free School District, supra.
3. IDEA also requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled. 34 C.F.R. Section 300.550(b). See also 20 U.S.C. Section 1412(5)(b); 34 C.F.R. §§300.550-300.556; Conn. State Regs. Sections 10-76a-1 and 10-76d-1. School districts must evaluate whether a student can be educated in a regular classroom if provided with supplemental aids and services, and a full range of services must be considered. Oberti v. Board of Education, 995 F.2d 1204, 1216 (3d Cir. 1993). The district must examine the educational benefits, both academic and nonacademic, to the student in a regular classroom. Among the factors to be considered are the advantages from the modeling the behavior and language of non-disabled students, effects of such inclusion on the other students in the class and the costs of necessary supplemental services. Id. In this case, there is no credible evidence that the district engaged in the type of analysis required. The IEP does not satisfy the Board's obligations under state and federal law to provide an appropriate IEP in the LRE.

4. The Board argues that the law does not require it to provide regular education for preschool children. Section 300.552 provides in relevant part:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that--

- (a) The placement decision--
- (2) Is made in conformity with the LRE provisions of the subpart, including Sections 300.550-300.554;

Section 10-76d-14(c) of the Regulations of Conn. State Agencies provides:

Each board of education shall provide early childhood programs designed to meet the needs of preschool children requiring special education and related services. Such programs shall be provided in school, in the child's home, or in alternative settings as set forth in section 10-76d-14(a) and (b) of these regulations.

The Parents were not requesting that the student not be placed with any other disabled students, but that he be placed in a mainstream class. Since the Board did not have one, it was appropriate to request a private preschool program.

5. The Board is obligated to evaluate a student for all suspected areas of disability. 34 C.F.R. Sections 300.320. The Board need not conduct an evaluation where, as here, the Parents have provided evaluations and reports on the current levels of functioning of a student. Section 300.533. The Board did one evaluation in occupational therapy, but she made no contradictory recommendations to the Parents' service provider Ms. Ossi. Since all of the evaluators recommended a mainstream classroom, the Board could not ignore those recommendations. P.J. v. State of Conn. Board of Education, 788 F. Supp. 673 (D. Conn. 1992).
6. The Board is required to provide related services and equipment "which enable a disabled child to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned.'" Cedar Rapids Community School District v. Garret F., 119 S.Ct. 992 (1999). See also IDEA Section 1401(a) and 34 C.F.R. Section 300.24. The Board does not dispute that N. requires speech and language therapy and occupational therapy. They offered no evidence to show that N. required less than was recommended by his service providers.
7. The Board is required to develop an IEP in all areas of need, including behavior. 34 C.F.R. Section 300.346(a)(2)(i). Further the IEP should provide personalized instruction to address N.'s specific needs and afford N. the opportunity for more than trivial advancement, and be reasonably calculated to enable N. to receive educational benefit. Board of Education v. Rowley, 458 U.S. 176, 189, 206-207 (1982); Walczak v. Florida Union Free School District, 142 F.3d 119, 130 (2d Cir. 1998); Mrs. B. v.

Milford Board of Education, 103 F.3d 1114, 1121 (2d Cir. 1997). Applying these standards to the evidence heard in this case, the IEP failed to meet the requirements because it offered no ABA therapy, behavior intervention plan or mainstream classes or sufficient related services.

8. The Parents have the burden to prove that the unilateral placement at St. Paul's nursery and Christ Church nursery school, as well as the home-based ABA therapy program provided N. with FAPE. 34 C.F.R. Section 300.403. Florence City School District v. Carter, 510 U.S. 7, 15 (1993); M. S. v. Yonkers Board of Education, 231 F.3d 96 (2d Cir. 2000).
9. The placement at those community preschools was appropriate for N. because it was the least restrictive environment for him. The Board did not contend or prove that N. cannot be educated in a mainstream classroom. The Parents have met the burden of proof regarding the unilateral placement.
10. The IDEA defines related services in 20 U.S.C. Section 1401 (22) as: "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education. . . ." The Parents have proven that home-based ABA therapy and 1:1 aide qualify as supportive services, which are required to assist N. to benefit from special education.

#### **FINAL DECISION AND ORDER:**

1. The Board failed to offer N. an appropriate IEP for the 2001-2002 school year, including ESY for summers 2001 and 2002.
2. The Christ Church preschool program was appropriate for the 2001-2002 school year.
3. The mainstream summer programs provided by the Parents were appropriate for the ESY summer 2001 and 2002 programs. Parents are entitled to reimbursement for the cost of an aide for N. to attend them.
4. The home-based ABA program for outside of school and summer camp hours provided by the Parents, as well as occupational therapy and speech and language therapy, were appropriate.
5. The Board shall reimburse the Parents for the costs associated with maintaining these appropriate placements and services for the 2001-2002 school year and ESY for summer 2001 and summer 2002.
6. The Parents should be reimbursed for the cost of expert testimony by Mr. Amerson and Dr. Schwartz.