

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Canton Board of Education

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Appearing Before: Attorney Justino Rosado, Hearing Officer

FINAL ORDER AND DECISION

ISSUES:

1. Whether the Student is eligible for special education and related services as defined in 20 U.S.C. §§ 1401 et seq?
2. Whether the Board's program for the 2001-02 school year provided the Student FAPE?
3. Whether the Board's program for the 2002-03 school year provided the Student FAPE?
4. If not, should the Student be placed in an out of district therapeutic placement, homebound, or a combination Canton High School/FOCUS program placement as requested by the Parent?
5. What is the student's stay put? (The parties subsequently resolved this issue by the resumption of homebound services following the diagnostic placement and the Hearing Officer need not resolve this issue.)
6. The issue of whether the Board's program for the 2003-04 school year provided the Student FAPE was added after the commencement of the hearing.

PROCEDURAL HISTORY:

The Parents' attorney filed a request for due process on January 6, 2003. (Hearing Officer (Hereinafter HO) Exhibit 1). A pre-hearing conference was held on January 17, 2003 at which time hearing dates of January 31 and February 27, 2003 were selected at the convenience of the parties. Hearing dates were chosen for March 12, 21, 26, April 30, May 9, 12, June 6, 19, 27, July 9, 10, 29 and concluded on September 12, 2003.

The Parents wanted to submit a tape of the December 17, 2002 PPT meeting. The Board objected to this exhibit. The hearing officer sustained the Board's objection and the tape was not an exhibit. IDEA does not prohibit or permit audio-tape recording of a PPT. It is the decision of the school district whether they will allow audio-tape recordings of a PPT as long as it is not done discriminately. In this matter both the Parents and the Board audio-taped the PPT. A copy of the district's audio-tape recording was provided to the Parents. The Parents opined that the recording was not complete and parts were not understandable. The hearing officer allowed the district's audio-tape recording to be clarified, by the Post Reporting Service who is the official recorder of all Due Process hearings. Post Reporting Service, utilizing the Parents' copy of their audio-recording to clarify any word or section of the Board's audio-tape recording that was not audible, made a transcript of the recording. The transcript was made a Parents' exhibit (P-62) by agreement of the parties. Any recording of an IEP meeting that is maintained by the school district is an "educational record" within the meaning of FERPA 20 U.S.C. §1232(g). *Notice of Interpretation of IEP Requirements*, Appendix C to CFR Part 300, Question 21.

Post Hearing Briefs were requested by the Parties and a briefing schedule was established with briefs due on October 20, 2003 and briefing format and page limits established. Subsequently, the Board's counsel had requested three (3) extensions of time and the Hearing Officer allowed the parties to submit their respective briefs on November 17, 2003. The Board's brief was received after the scheduled date and the Parents objected. The Board's excuse was that the brief had been sent to the wrong address and a copy of the envelope with the incorrect address was provided to all parties and the Parent withdrew their objection.

An objection was raised by the Board, whether the Parents exceeded the briefing format and page limit but the Board withdrew its objection. The parents filed another request for due process hearing Case 03-205, and on July 29, 2003 a request was made to consolidate the Parents' two Due Process hearing requests. The Board did not object and the Hearing Officer granting the Parents' motion and took jurisdiction of Case # 03-205.

Due to the many days of hearing and the amount of exhibits the date for filing the Final Decision and Order was extended to January 22, 2004.

SUMMARY:

The student is a 15 years and 11 month old young man who is enrolled in the Board's school since the 2000-2001 school year. The student had been diagnosed with an emotional disturbance and OHI-ADHD and eligible for special education and related services. On or about December 17, 2002 the PPT determined that the student was no longer eligible for special education and related services as defined at 20 U.S.C. §§1401 et seq. The Parents objected to this finding and have also objected to the 2001-2002 and 2002-2003 IEP as not providing the student with a free, appropriate public education (FAPE). At the July 29, 2003 hearing date, the issue of whether the Board's program for the 2003-2004 school year provided the Student FAPE was added.

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. For reference, see 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).

STATEMENT OF FACTS:

1. The student is a 15 years and 11 month old young man who has been enrolled in the Board's school since the 2000-2001 school year. The student had been diagnosed with an emotional disturbance and OHI-ADHD and eligible for special education and related services. On or about December 17, 2002 the PPT determined that the student was no longer eligible for special education and related services under the provisions of the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §1401 et seq. and Connecticut General Statutes, § 10-76, et seq. (Testimony of Father and Parents' Exhibit (Hereafter "P") # 62)
2. The student had attended public school in another school district where he was first identified as a student with a serious emotional disturbance requiring special education and related services. The student had organizational problems, demonstrated an inability to complete his homework and showed signs of depression. Board's Exhibit (Hereafter "B") #1)

3. The student and his family moved to the Board's school district on or about August, 2000. He was enrolled in and attended the Board's public schools during the 2000-2001 school year. The IEP developed by the prior school district was utilized by the Board at the commencement of that school year. (Testimony of Father)
4. During the student's 2000-2001 school year at the Board's school his grades were 4 A's, 6 B's, 2 C's and in one class he obtained a passing grade. (B-16)
5. There is no dispute that the PPT had determined that the student was eligible to receive special education and related services as a student with an emotional disturbance and OHI-ADHD as defined by the I.D.E.A., 20 U.S.C. §1401 *et seq.* and applicable Connecticut statutes and regulations during the 2000-2001 and 2001-2002 school years and at each PPT up to the PPT convened on December 17, 2002. (Testimony of Father)
6. The Board convened a PPT meeting on June 20, 2001 in order to discuss a program and placement for the Student during the 2001-2002 school year. Before the meeting was to convene the PPT team received notice that the Parents requested a postponement of that meeting. The Board went forward with the PPT and proceeded to create goals and objectives. The Parents requested another PPT meeting and the Board then scheduled another PPT meeting on June 22, 2001 with the Parents in attendance. The Parents provided the PPT with their concerns and input regarding the Student's needs at that meeting. Specifically the Parents requested counseling services five periods per week and the Board only agreed to provide two periods per week to address his needs with his ED peer relationships, impulsivity and his sensitivity to criticism. (Testimony of Director of Special Education (Hereafter "DSE") and B-14)
7. The Parents prepared a draft of goals and objectives for the June 22, 2001 PPT. This draft was not presented to the PPT. The draft was a proposed behavioral plan. The PPT had created a behavioral plan for the student's IEP but there was a problem implementing the plan. (Testimony of "DSE", B-14 and B-60)
8. The student had a problem completing his homework. This is a problem the student had in the other district's school and continued to have in the current school district. The June 20, 2001 PPT created goals and objectives to address this problem. (B-1 pg.1 and B-14 and B-42) During the 2001-2002 school year, the student regularly attended the after-school homework club which helped him complete his assignments. The district provided the student with a homework buddy as the father had requested. The father was of the opinion that the student was pushed by the teachers in order to complete his homework and obtain passing grades. The father felt that the student should have been held accountable and given failing grades in core classes rather than being allowed to make up the homework. (Testimony of Father)

9. The student’s psychologist was worried about the student remaining in the district’s school. He contacted the school psychologist and social worker in order to find out how the student was performing and behaving. These contacts were prompted by his meetings with the student or the student’s father. Even though the student had behavior problems and the doctor was concerned with the student being in the district’s school, the student maintained his grades during the 2001-2002 school year. (Testimony of Robert H. Sahl, M.D.)

10. During the 2001-2002 school year, the student participated in two theatrical performances at the Board’s Junior High. The student played the lead in the dramatic production and was a cast member in *The Music Man*. (B-50) In another performance, the student played a role as a counselor to *Fairy Tales*. The production was a positive experience for the student because some of the other students obtained a good opinion of the student. (Testimony of Special Education Teacher and Father)

11. During the 2001-2002 school year, the student also participated in the Greek Banquet, a school event in which the student either had to give a speech to the rest of the eighth grade and the teachers or had to participate in front of the same audience in a contest that was called “Trojan Trivia.” The student was a member of the Link Club, which is a group of students who work with senior citizens and with mentally retarded individuals. (Testimony of Special Education Teacher)

12. The Parent sent two e-mails to the Board on February 15, 2002, that the student’s 2001-2002 IEP was not meeting the student’s needs. The Parent pointed out that the student:
 - a. was failing in one subject area
 - b. that the Student was not doing his schoolwork or homework,
 - c. that he was not an independent learner
 - d. that he had organizational deficits,
 - e. that he had behavioral problems, and
 - f. that he was otherwise struggling in school. (B-19 and B-20)

13. The school superintendent was informed by the student’s father that the student was having a problem with peer relations. The student had an altercation with another student in the school stairwell and another with a student in the hallway and the father was concerned for the student’s safety in the school environment. (Testimony of School Superintendent and “DSE” and P-23)

14. The student’s final grades and comments for the 2001-2002 school year were as follows:

<u>Subject</u>	<u>Grade</u>	<u>Comments</u>
English 8 A	B+	A Pleasure to Have in Class/Regularly Participates
Pre Algebra 8	A-	An Asset to the Class/Class work Excellent
Physical Science 8	B+	Excessive Absences/Tardies
Social Studies 8	A	A Pleasure to Have in Class/Regularly Participates

Reading 8	A-	(No Comments)	
FACS 8	Incomplete	(No Comments)	
Tech. 8	B+	(No Comments)	
Drama 8	A	(No Comments)	
Resource Room	A	Class work Excellent/Good Academic Student	
JH Choir 8	B	A Pleasure to Have in Class	
PE 8	C	(No Comments)	(B-52)

15. A PPT was held on June 12, 2002, to create an IEP for the student for the 2002-2003 school year. The "DSE" testified that the Parent had informed the PPT on June 12, 2002 that he did not share the school district's opinion that the Student had a successful 2001-02 school year; and that he believed that his son's emotional disability had not been properly addressed and that he had concerns with his son's safety if he were to be placed at the Board's High School. The Parent had shared information at the June 12, 2002 PPT that had been provided by Dr. Sahl, his son's treating psychiatrist, who had requested for his patient placement at a therapeutic school and an extended school year (ESY) for the summer 2002 at the FOCUS program. The Board rejected the Parent's request for a therapeutic placement and recommended instead an IEP with resource room support, organizational supports, and social skill training for the 2002-03 school year. The PPT team concluded that the student did not require summer services. (Testimony of "DSE")
16. The student made limited to satisfactory progress in his social/behavioral goal and objectives during the 2001-2002 school year. The Parent requested intensive counseling for his son. The student was resistant to individual counseling. The PPT recommended a social skills group, a studies skill group and an after-school homework program. The Parent rejected the PPT's proposals and requested additional time to review the proposed IEP. (B-50)
17. The student's psychiatrist testified that the therapeutic placement recommended for the student was for behavioral issues and peer relations not educational reasons. The doctor was of the opinion that therapeutic schools are not a challenge for children as bright as the student. (P-38 and Testimony of Robert Sahl, M.D.)
18. During the summer of 2002, the student was attacked by other students at a swimming pool. This was not a school activity or school sponsored activity. The student was employed by the pool. The student suffered a black eye. The student who was the perpetrator left the Board's school. (Testimony of "DSE" and Father, B-55)
19. The student's PPT convened on August 29, 2002 and continued on September 9, 2002. At the August 29 meeting, the father presented the Team with copies of letters from the student's psychiatrist and therapist. Following lengthy discussion, the PPT recommended a psychiatric evaluation and offered the Parent the names of two psychiatrists. The PPT further recommended that the student's June 2003

- triennial evaluations be moved up to the fall of 2002 and suggested that the student be placed diagnostically at Farmington Valley Diagnostics. Although the Parent agreed to reschedule the triennial for fall of 2002, he rejected both psychiatrists as well as a diagnostic placement at Farmington Valley Diagnostics. Dr. Sahl had discussed the Wheeler Clinic's therapeutic school with the father as a possible placement for the student during the 2002-2003 school year. The team agreed that the student's placement would be homebound instruction at the town's community center with an IEP goal for homebound instruction. Subsequently, at the August 29, 2002 PPT meeting, the father requested that the student be placed at Wheeler Clinic's Northwest Village School as a diagnostic placement and that the triennial evaluations be conducted there. (B-55 and Testimony Special Education Teacher)
20. The student did not want to attend Wheeler Clinic but instead wanted to attend the Board's High School for the 2002-2003 school year. At the September 9, 2002 PPT meeting, the father noted that the student was unhappy about the possibility of not attending the Board's High School. The parties agreed to the Diagnostic Assessment and Referral Team Evaluation (DART) at Wheeler Clinic as an eight-week diagnostic placement. This independent evaluation was sought in order to thoroughly assess the student's needs and to identify appropriate recommendations. (B-55, P-62, P-69 and Testimony of Special Education Teacher).
21. The team presented three questions that were to be addressed by the psychiatric evaluation at the Wheeler Clinic. The questions were :
- What is the student's current social-emotional functioning?
 - Is the student a risk to himself and others?
 - What would be the DART team recommendation regarding an appropriate educational environment?
- The Parent disputed that these questions were developed at the September 2002 PPT. (Testimony of Father, B-55)
22. The student was scheduled to begin the diagnostic placement at Northwest Village School on or about October 9, 2002. (B-60) On or about October 6, 2002, the student was hospitalized by his father following his threat to commit suicide rather than attend the Wheeler Clinic School; he did not begin at Northwest Village School until on or about October 16, 2002. (B-61, B-62, B-64).
23. During the student's diagnostic placement at the Northwest Village School, the Wheeler Clinic conducted the DART evaluation, which represented all of the evaluation components that went into the assessment as a part of the diagnostic placement. The evaluation team consisted of a clinical psychologist, a psychiatrist, a social worker, and the student's special education teacher at Northwest Village School. The different components of the DART evaluation were written by the different evaluators, which reports were then integrated into

- one comprehensive report by Dr. Robert E. Muro, Jr., a clinical psychologist who had also conducted part of the evaluation. (B-69 Testimony of Martha Nunes)
24. As part of the DART evaluation, Ms. Nunes and Dr. Christine A. McNaney, a psychologist at the Wheeler Clinic, met with the father and explained in great detail about the evaluation components and what the process would be like. During those meetings, the father agreed to a child and family evaluation being included as part of the DART assessment. (Testimony of Martha Nunes)
 25. The diagnostic placement, including the DART assessment, constituted the student's triennial evaluation. Nonetheless, following the DART report, the father requested yet another out-of-district psychiatric and psychological evaluation of the student. B-73(6).
 26. The student was in homebound instruction prior to the diagnostic placement and the student thought he did not need to attend Northwest Village School after the evaluations ended. The Parent, not to add to the student's frustration, let the student stay home. Northwest Village School teachers felt closure with school had not been done by the student so the student returned to Northwest Village School. (Testimony of Father)
 27. The DART assessment team report was reviewed at a PPT meeting on December 4, 2002 and December 17, 2002. The DART staff did not complete the presentation of their findings on the first PPT date, and the PPT reconvened on December 17, 2002 in order to review the DART team's recommendations. The Parent indicated that the DART report contained numerous inaccuracies and errors. The father made a statement in which he requested that the student be placed in a therapeutic, out-of-district placement. (B-69, B-74, B-73)
 28. The DART team found that the student had a considerable amount of emotional distress characterized by anxiety and sadness such that it interfered with the student's ability to enjoy life. The team found that the student has such inner tension that he has difficulty with self-control and that his behavior can be compulsive at times, but he did not seem to present as a danger to himself and others. (B-69)
 29. The DART team found that the student is very bright with above average abilities in nearly all academic areas. The student has weaker concentration and processing speed skills which leads to a diagnosis of Attention Deficit Disorder. The student was also diagnosed with Depressive Disorder NOS, Anxiety Disorder NOS, and parent and sibling relationship problems. (B-69)
 30. The team made 12 recommendations some of which were :
 - a. a transition plan to the Board's high school,
 - b. ongoing resource room assistance,

- c. recommendations to improve the student's performance in respect to his homework,
 - d. time-limit and individual counseling and clinical services outside the school including family counseling,
 - e. individual psychotherapy and parent training for the father, and
 - f. a plan to improve the relationship between the Board and the parent. (B-69)
31. The Parent was not in agreement with the DART evaluation. The father felt that the DART evaluation made recommendations that did not address the seriousness of the student's social problem and that transitioning the student back to the Board's high school was not in the best interest of the student and would not be the proper placement for the student. The December 4, 2002 PPT was continued to December 10, 2002 but the PPT was postponed until December 17, 2002 to accommodate the attorneys. (B-69)
32. The PPT reconvened on December 17, 2002 where the student's eligibility for special education was reviewed. The District members of the PPT were of the opinion that the student did not qualify for special education because his disabilities did not have an adverse effect on his educational performance. The Parents did not agree with this opinion. The DART team was not required as part of their evaluation to determine the student's eligibility for special education but at the PPT Dr. Mauro was asked, according to the criteria of emotionally disturbed, if the student's disability had an adverse effect on his educational performance. (Testimony of Director of Special Education, B-69).
33. Ms. Nunes testified that at the beginning of the December 17th PPT meeting Dr. Muro had agreed that the student had met the SED criteria and this had an adverse educational impact thereby indicating that the student was emotionally disturbed. Dr. Muro changed his opinion on whether the student's emotional disability had an adverse educational impact later on during the December 17th PPT, when a member of the Board had either discussed or shown him a copy of the Department of Education's SED Guidelines. Dr. Muro did not change his opinion that the student was emotionally disturbed. Ms. Nunes testified that the student's failure to complete homework and poor attendance and tardiness could have an adverse impact upon the Student's educational performance. (Testimony of Martha Nunes, P-62)
34. At the beginning of the December 17, 2002 PPT meeting, the "DSE" asked the Board's attorney "... to start with the eligibility question." In response to her request, the Board's attorney stated, "...Based upon the [the Student's] academic performance, both through last year and during his time at Northwest Village School (Wheeler Clinic), based upon testing results, the team is of the mind that [the Student] does not qualify for special education services, given the fact that whatever his diagnosis [is] (sic) not having an adverse educational impact upon him." The "DSE" testified that the PPT then proceeded to determine if the Student

was eligible for special education as student with a learning disability. (Testimony of "DSE", P-62)

35. At the December 17, 2002 PPT meeting, the student was offered special education and related services even though determined not eligible for special education and related services. The PPT felt that the student needed a smooth transition period before entering the mainstream program at the Board's school and allowing him to remain in special education for the transition period would help the transition. (Testimony of Director of Special Education).
36. The PPT ruled out that the student was eligible for special education and related services under the category of OHI-ADHD based upon the assumption that because there was no significant educational impact for ED, that the same data could be used to determine ineligibility under the OHI-ADHD category. (Testimony of Director of Special Education)
37. During the remainder of the 2002-2003 school year, the student received his homebound instruction at the Canton Public Library. The homebound instructor reported that the student's productivity with his schoolwork was eighty per cent during the fall, 2002 and after April, 2003 he reported that the student had "shut down", would not complete any homework and was repeatedly late to his tutoring sessions. The tutors reported an initial homework completion rate of eighty percent, then seventy percent, and then zero percent, after April, 2003. The homebound instructor stated that the Board did not provide him with a copy of the student's IEP and that he learned that the student had special needs and had a diagnosis that included ADD and ED. The tutor reported that he did not work on any IEP goals or objectives that had been developed for the homebound program. The goal for homebound instruction showed limited progress. (Testimony of Homebound Instructor)
38. The student's father did not believe he was responsible for ensuring that the student complete his homework, nor did he impose any of what he termed "natural consequences" when the student failed to do so. (Testimony of Father)
39. The student did not complete his 2002-2003 schoolwork, including homework, by the close of the 2002-2003 school year. The student's grades were not affected by the fact of his repeated tardiness, or his incomplete schoolwork or homework. At a PPT meeting on June 6, 2003, the Board offered thirty to forty additional homebound tutoring hours during the summer 2003, in order to allow the Student to complete his biology and social studies school work for the 2002-2003 school year. (P-72)
40. The student attended Canton High School on a part time basis for five class periods per day for the 2003-2004 school year, and he receives homebound tutoring for a sixth class period. (Testimony of Director of Special Education)

41. At its June 6, 2003 meeting, the student's PPT maintained his eligibility as a special education student pending the completion of the due process hearing. The father requested that the Board place the student in an therapeutic, out-of-district placement for the 2003-2004 school year or, in the alternative, in a partial day placement at Canton High School combined with a partial day placement at FOCUS. Additionally, the Parent requested that the district provide the student with extended year services during summer 2003 at FOCUS, but the Team declined to do so as the student had been making educational progress and there was no concern about regression. (Testimony of Father, P-72)
42. On August 27, 2003, the parties convened another PPT meeting. At that meeting the parties to this proceeding each had agreed to voluntarily modify their respective positions, without prejudice to their respective positions asserted in the due process hearings, and allow the student to attend a modified and structured program during the morning at Canton High School. The Board developed an initial school safety plan at that PPT meeting in an attempt to address the Parents' concerns with the student's physical safety at the school. The Parents placed the Student at the FOCUS program during the afternoon, at their expense. (P-74, Testimony of Father)
43. The father testified that his goal always has been to have the student return to the Canton Public Schools. The father believed the student's return to school had been accomplished in a "positive way," and testified that the student was "very happy" to be attending Canton High School. During the first two weeks of school, the student's attendance and punctuality had been excellent, and there had been no incidents of any kind. (Testimony of Father)
44. The Director of the FOCUS Program testified that the Student had attended the FOCUS program during the summer 2001 and summer 2003 and made progress in that program. The FOCUS Program could provide a therapeutic program that would address the student's social skills, anxiety management, coping skills, peer relations, leisure skills, and teaching him self-awareness skills in order that he would understand the impact of his negative behaviors upon others. (Testimony of Donna Swanson)

CONCLUSIONS OF LAW:

1. The student is entitled to special education and related services to be provide at public expense pursuant to 20 U.S.C. §§ 1401, et seq (IDEA) and Connecticut State Regulations §76a-1(d).

2001-2002 SCHOOL YEAR:

2. Connecticut Regulations provide that "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. 10-76h-14(a) *see also Walczak v. Florida Union Free School Dist.*, 142 F.2d 119, 122 (2d Cir. 1998).

3. The Parents allege that the Board did not provide the student with a FAPE during the 2001-2002 school year. The standard for determining whether a Board has provided a free appropriate public education starts with the two-prong test established in *Board of Education of the Hendrick Hudson Central School District et al v. Rowley*, 458 U S 176 (1982), 102 S Ct 3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.

4. The Parents are important members of the PPT team. The Board may conduct an IEP meeting when the parent is not in attendance if the Board cannot convince the parent to attend. 34 C.F.R. 300.345 (d). There was no evidence presented that the Parents did not want to attend the PPT. Even if there had been evidence presented the Board did nothing to convince the Parents to attend. This is a procedural violation but it was minor in that the Board complied with the Parents' request and provided another PPT two days later. (Findings of Facts # 6).

5. The second prong of *Rowley*, 458 U.S. at 192, requires a determination of whether the Board's IEP was reasonably calculated to enable the student to receive meaningful educational benefit. In order to provide the student with meaningful educational benefit, the IEP must provide more than mere trivial advancement that is one that is "likely to produce progress, not regression." *Mrs. B. v. Milford Board of Education* 103 F.2d 1114, 1121 (2d Cir. 1997) The Parents are of the opinion that the IEP was not appropriate in that the student's special needs were not being addressed. Testimony and exhibits clearly show that the student was receiving more than passing grades in his curriculum. (Findings of Facts # 14). The Board argues that a student, whose grades are good and does well in his State mastery test, is receiving an appropriate public education and should not be eligible for special education. The Court in *Rowley at 203, footnote 25* noted that just because a student is passing from grade to grade is not *per se* evidence of an appropriate education. The Court in *Rowley* did not establish one test for determining the adequacy of education benefits. According to the district court for the Northern District of Illinois, "Educational performance means more than a child's ability to meet academic criteria. It must also include reference to the child's development of communication skills, social skills, and personality, as the [IDEA] itself, requires." *Mary P. v. Illinois State Board of Education*, 23 IDELR 1064, 1068 (N.D. Ill. 1996). In the present case, a behavioral plan was created to assist the student in his social skills but was not implemented because of difficulties. (Findings of Facts # 7). Behavioral goals and objectives were included in his IEP but the student made only limited to satisfactory progress in his objectives. (Findings of Facts # 15). The student continued to have behavioral and peer problems but exhibited an ability to interact with his peers and control his behavior by being able to play important roles in different dramatic productions and give a speech before his peers at the "Greek Banquet". With all his psychological problems he was able to obtain good grades and even with the problems

with his behavior plan and his altercations with some peers, the student was able to interact socially with his peers showing that the education benefit from the IEP was more than just receiving passing grades. The student's 2001-2002 IEP was appropriate.

STUDENT'S ELIGIBILITY.

6. At the December 17, 2002 PPT, the team found that the student was no longer eligible for special education and related services. This finding was not correct. The student is eligible for special education and related services as a child with a disability of emotional disturbance. 20 U.S.C. §1401(3)(A)(i)

7. The PPT team also included the Board's and the Parents' attorney. The IEP may, at the discretion of the parent *or* (emphasis added) the agency, include "other individuals who have knowledge or expertise regarding the child." 34 C.F.R. 300.344(a)(6) The two attorneys were invited by the Parents or the Board and do have knowledge or expertise regarding the child. It was therefore, not incorrect or a violation of IDEA for the Board to allow its attorney the opportunity to make a statement at the PPT, since it is the Board's discretion or the parents if their attorney can be a member of the Team. *Notice of Interpretation of IEP Requirements*, Appendix C to CFR Part 300, Question 29. Even though there was no testimony of the Board or the Parent making that decision, the attorneys' active participation in the PPT process instead of just counseling the client would make them a member of the PPT team. The statement made by the Board's attorney was a predisposition made by the Canton members of the team about the eligibility of the student. (Findings of Fact #34). District members of the team can meet to discuss and even prepare *draft* goals and objectives for a student and then present them for discussion but these are only *drafts*. (Emphasis added).

The Canton members of the team came with a decision that the student was not eligible for special education and then proceeded to prove their decision by reviewing the eligibility criteria for a learning disability and emotional disturbance. Only the PPT team can decide eligibility. Dr. Mauro at first stated that the student's behavior adversely impacted the student's educational performance. The school psychologist read the State Guidelines for Eligibility as Emotionally Disturbance and, looking at achievement data, grades and Connecticut Mastery Test, Dr. Mauro changed his opinion and agreed with the Board members of the team that the student's disability as ED did not have an adverse impact of his educational performance. (P-62, pp. 35-36, 43). State Guidelines are only guidelines and not statutes or state regulations which must be adhered to. The student since his inception into the Board's school system maintained good grades, but consistently showed the same problem in behavior, social skills, organization, homework assignment and peer problems. The evaluation and Dr. Mauro's interpretation of the DART evaluation clearly showed that the student is a child with emotional disturbance who still managed to get good grades. According to the district court for the Northern District of Illinois, "Educational performance means more than a child's ability to meet academic criteria. It must also include reference to the child's development of

communication skills, social skills, and personality, as the [IDEA] itself, requires." *Mary P. v. Illinois State Board of Education*, 23 IDELR 1064, 1068 (N.D. Ill. 1996).

No single procedure is to be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 C.F.R. § 300.532(f). The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.532(g). The District members of the team ignored the student's social and emotional status and just reviewed his academic performance as the totality of his educational performance. The PPT also met in June 6, 2003, at which time the plan was still to exit the student from special education. From the beginning of the 2002-2003 school year the student had to be hospitalized for suicidal ideations because of the anxiety of his upcoming placement at Wheeler Clinic. He was not completing his schoolwork and homework and required an expansion of the 2002-2003 school year in order to pass his classes. (*Findings of Facts # 22, 36 & 38*). These clear signs of a marked deterioration in his disability and his poor and failing performance in his educational program showed that the student was eligible for special education and not ready to be exited. At the December 17, 2002 PPT, the team also found that the student was no longer eligible for special education and related services with the disability of OHI-ADHD. (*Findings of Facts # 35*). This finding was not correct. There was not a separate evaluation for this category. It was based on the same findings as the disallowance as emotional disturbance. That finding was erroneous and so is the finding of ineligibility for special education and related services as a child with a disability with OHI-ADHD. The student is eligible for special education and related services as a child with a disability of OHI-ADHD. 20 U.S.C. §1401(3)(A)(i)

EXTENDED SCHOOL YEAR 2002-2003 and 2003-2004

8. The Parent requested an extended school year for the 2002-2003 school year and 2003-2004 school year. There was no clear evidence presented that a summer program should have been included in the student's IEP. There was no evidence presented that the student's educational performance would deteriorate during the summer that would cause regression or that his social skills would deteriorate and affect his educational performance. The student's psychiatrist, who recommended a summer program and a residential placement for the student clearly stated that his recommendation for the student was for behavioral issues and peer relations not educational reasons. Therefore the request for an extended school year for the 2001-2002 and 2002-2003 school years is denied.

2002-2003 SCHOOL YEAR 2003-2004 SCHOOL YEAR

9. The program for the 2002-2003 and 2003-2004 school year was not appropriate.

An IEP must be designed to produce educational benefits but need not provide a "potential-maximizing" education. *See Rowley*, 458 U.S. at 197 n. 21. "The Supreme

Court ... has specifically rejected the contention that the 'appropriate' education mandated by IDEA requires states to 'maximize the potential of handicapped children' ... The purpose of the Act was 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.' " *Walczak v. Florida Union Free School Dist.*, 142 F.3rd 119, 130 (2d Cir. 1998) (citations omitted). *See Rowley*, 458 U.S. at 203 (State satisfies FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"). "[F]or an IEP to be 'reasonably calculated to enable the child to receive educational benefits,' ... it must be 'likely to produce progress, not regression.'" *M.S. ex rel. S.S. v. Board of Educ. of the City School Dist. of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000) (citations and internal quotation marks omitted). The PPT found that the student was not eligible for special education and related services as stated above this finding were erroneous and the student is a child with a dual disability with emotional disturbance and OHI-ADHD. 20 U.S.C. §1401(3)(A)(i), 34C.F.R. 300.7(c)(4) & (9). , (Conclusions of Law #6 & 7)

The student was placed on homebound as his stay put. The PPT should have created an IEP to meet the student's needs and provide him with FAPE. Neither the IEP of 2002-2003 nor 2003-2004 would have conferred meaningful educational benefit upon the student therefore he would have been denied FAPE. The student's suicidal ideations were not considered by the team and neither was his "shut down" as reported by his homebound instructor. The student's treating psychiatrist recommended a partial day treatment program at FOCUS and the balance of the school day at the Board's high school. The DART evaluation recommended the Board's high school for his 2002-2003 school year, but this was prior to the student's shut down in his homebound placement and the PPT extending the student's 2002-2003 school year by 30-40 hours so the student could finish his school work and be promoted. The student had deteriorated during the 2002-2003 school year to the extent that a student who obtained A's and B's, now required an extra 30-40 hours of tutoring in order to get passing grades. The Team failed to consider the student's downward slide and offer him an appropriate program. A partial day treatment program at FOCUS with the balance of the school day at the Board's high school would have been an appropriate program for the student in the least restrictive environment (LRE). The student would have been able to maintain contact with non-disabled peers and receive the assistance for his disabilities that would have allowed him to receive FAPE. The student could then have been transitioned back into the Board's high school as the father wanted. (Findings of Fact # 42)

FINAL DECISION AND ORDER:

1. The program offered by the Board for the 2001-2002 school year was appropriate.
2. The Student is eligible for special education and related services as emotional disturbance and OHI- ADHD as defined in 20 U.S.C. §§ 1401 et seq.
3. The Board's program for the 2002-2003 school year was not appropriate.

4. The Board's program for the 2003-2004 school year was not appropriate.
5. The Student should have been placed in a combination Canton High School/FOCUS program placement for the 2002-2003 school year.
6. The Board shall convene a PPT meeting within fifteen days of this decision and write an IEP establishing the Student's eligibility under the ED and OHI-ADHD categories and develop appropriate goals and objective taking into account the recommendations from the DART Evaluation, the student's treating psychiatrist, Dr. Sahl and any other evaluations developed after the close of the record of the Due Process Hearing in this matter.
7. The Board shall not be required to reimburse the Parents for the cost of the summer program for 2002.
8. The student does not require a summer program for 2003.