

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Norwalk Board of Education v. Student

Appearing on behalf of the Board: Attorney Marsha Belman Moses
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing on behalf of the Parent: The Parent proceeded *pro se*.

Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Whether the Board properly determined that the Student is eligible for special education under the eligibility category of Emotional Disturbance, such that special education services can be provided to him.

PROCEDURAL HISTORY:

The Board requested this hearing on July 2, 2004. The mailing date of the decision was extended at the Board's request, and absent objection from the Parent. The first hearing date was scheduled for September 2, 2004.

At the September 2 hearing, the Board attorney appeared, but the Parent was not present. The Board attorney reported that the Board had been informed that the Parent was hospitalized on the date of the hearing, and also noted that there were some questions regarding the Student's residency. The Board attorney requested an extension of the mailing date of the decision at the hearing, and the matter was continued to September 23 to ensure that the Parent had an opportunity to appear at the hearing, and for the Board to determine if the Student continued to be a resident of the Board's district.

At the hearing on September 23, the Parent appeared with two family members for the hearing. Representatives of the Board and the Board attorney also appeared at that hearing. When the hearing commenced on that date, the Student's aunt interrupted the proceedings, and was admonished that the interruptions were not appropriate during the

proceedings. The aunt¹ interrupted again, and walked out of the hearing room, accompanied by the Parent and the Student's cousin. As she was walking out, the aunt vehemently stated that the hearing officer was biased and was racist and asked for a new hearing officer. The Student's family members, including the Parent, did not return to the hearing room. If what the aunt was requesting was a recusal of the hearing officer, that request was denied on the record at the hearing, as the hearing officer has no bias against the Student, the Parent, or other members of the Student's extended family.

The Board's witnesses were Marilyn Liberatore, principal of the Board's Columbus Magnet School and Susan Corey, the Student's teacher.

To the extent that the procedural history, 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)

SUMMARY:

From the first weeks of kindergarten, this second grade Student has exhibited impulsive, disruptive, physical and aggressive behaviors which have seriously impeded his education. Many regular education interventions have been attempted. The Parent agreed to evaluations and a diagnostic placement, but has not consented to the Student's eligibility for special education and related services under the designation of Serious Emotional Disturbance. The Board has requested this hearing to determine the Student's eligibility and to override the Parent's lack of consent to special education for the Student.

FINDINGS OF FACT:

1. The Student is 7 years old, and currently in second grade at the Board elementary school.
2. The Student has experienced behavior problems in school since his first week in kindergarten. On September 7, 2001, the Student's kindergarten classroom teacher submitted a Student Response Team [SRT] request due to her concern about the Student's temper tantrums in which he was throwing things and lashing out physically and verbally. The classroom teacher also noted a concern that the Student was moving around a great deal. [Testimony Ms. Liberatore, Exhibit B-1]
3. The SRT is a school team that meets when students are having academic or behavioral struggles to implement strategies to assist students. This is a process the school team used so that they can ensure that they do as much as they can

¹ The person identified as the Student's aunt in exhibits and in testimony is also identified as the Student's great aunt.

- prior to convening a Planning and Placement Team meeting [PPT] for the Student. [Testimony Ms. Liberatore]
4. At the first SRT meeting on September 14, 2001, the team discussed their concerns regarding the Student's fine motor control, and his difficulty in controlling his own behavior. In response to this SRT meeting, the Student was provided with an intervention aide to work on social-emotional issues, and a behavior plan was implemented. [Testimony Ms. Liberatore, Exhibit B-2]
 5. In the Student's kindergarten screening, which occurred in October 2001, it was verified that the Student's fine motor skills were very poor, and that his behavior continued to be an issue. In terms of behavior, the screening noted that the Student was very impulsive, and had difficulty understanding and following directions. After the screening, the Parent was notified that the SRT would continue to address the Student's academic and behavior needs, and that the Student would receive assistance on his fine motor skills. [Testimony Ms. Liberatore, Exhibits B-3, B-4]
 6. When the SRT reconvened on October 26, 2001, it was noted that the behaviors were getting in the way of the Student's academics. A behavior incentive plan was implemented in which stickers or a unifix cube would be accumulated for the reward of computer time. The Student was also receiving assistance from a resource room teacher in the classroom, as well as from a social worker who would give the Student social skills training in the classroom. At this time, the Parent and the Student's aunt acknowledged the fine motor problems, but would not acknowledge the Student's behavior problems. The Parent and the Student's aunt blamed the other children for the behavior problems. [Testimony Ms. Liberatore, Exhibit B-5]
 7. In November 2001, the SRT convened, and noted that the behavior plan with the incentive reward was a success. The Student's behavior deteriorated after that and a new Behavior Management Plan was created for the Student in December 2001. [Testimony Ms. Liberatore, Exhibit B-6, B-7]
 8. The SRT reconvened on January 11, 2002. At that review meeting, it was noted that the Student's behavior was still an issue, and that the Student's behavior declined in the afternoon. The SRT referred the Student for a PPT meeting. [Testimony Ms. Liberatore, Exhibit B-8, B-9]
 9. The PPT convened on January 29, 2002. At the PPT, the Student's classroom teacher noted that he had many disruptive, impulsive and off-task behaviors. It was noted that the Student had a behavior plan to keep his hands and feet to himself, and a chart for task completion. Academically, it was noted that the Student recognized numbers 1 to 10, and most letters. It was further noted that the Student had needs in the fine motor skills area, and frustrates easily. The members of the PPT concluded that the Student should have a language

- screening, and that the Connors scales were to be completed by the teacher and the Parent. [Testimony Ms. Liberatore, Exhibit B-10]
10. In March 2002, the PPT reconvened to review the results of the language screening and the Connors scales. At this time, there were still concerns regarding the Student's behavior in that he tends to be impulsive and not aware of others around him. It was noted that the Student bumps into others, too. Some improvement was noted in his behavior, however, and the Student was responding to the current behavior management plan. The Student was also continuing to have problems with his fine motor skills at this time. The Parent did not complete the Connors scales, as the Parent and the family felt they were intrusive. The teacher's scales noted moderate concerns in hyperactivity and conduct. The members of the PPT concluded that the Student would remain in regular education with the behavior management plan. [Testimony Ms. Liberatore, Exhibit B-12]
 11. At the conclusion of the kindergarten year, the family and the Board considered the possibility of retaining the Student in kindergarten for the following year due to his frustrations and difficulty with writing. It was decided that the Student would be placed in first grade, as he had made some progress at the end of the year, and it was decided that the Student would be too aggressive with the new kindergarteners. [Testimony Ms. Liberatore, Exhibit B-13]
 12. In first grade, the Student was provided additional interventions. Another aide was available for the Student, and he responded to "hot readers," which used music to reinforce reading skills. The Student received literacy support twice per week, plus hot readers twice per week. The family refused to have an intervention aide work with the Student in first grade, so the Board acquiesced to the family's request. [Testimony Ms. Liberatore]
 13. First grade did not go well for the Student. Early in the school year, a child pulled a marker from the Student's hand, and he slapped her in the face. The family was warned that if the Student hit another child, he would be suspended. Subsequent to that, on October 8, 2002, the Student slapped a boy in the face when the boy didn't say hello to him. The Student received a half day in-school suspension for that incident. [Testimony Ms. Liberatore, Exhibit B-14] A week after that incident, the Student punched another child for no apparent reason. He threw another child on the floor and punched him in the jaw. The Student could give no explanation for why he hit the other child. The Student was given another half-day in-school suspension for this incident. [Testimony Ms. Liberatore, Exhibit B-15]
 14. On December 3, 2002, the PPT reconvened to consider the on-going concerns with the Student. The concerns were related mostly to behavioral issues that appeared to get in the way of the Student's learning. The Student continued to have a behavior management plan to attempt to decrease the Student's negative

behaviors such as his inability to control his hands and feet, and his interrupting of group time. The school-based members of the team recommended social worker services, but the Parent noted that she didn't want the Student to see the social worker except on an as-needed basis. The Board acquiesced to this request, as it wanted to work in cooperation with the family. Regular education services were continued at this time. [Testimony Ms. Liberatore, Exhibit B-17]

15. On February 26, 2003, the Student received a 2-day suspension for another physical incident. While playing in the block area, the Student wanted one of the animals another child had, and he slapped the child's arm. The Student was given a ten minute time out. Promising not to hit or cause a problem again, he was allowed to return to the block area. He was there only one minute when he wanted another animal that the child had. The Student pushed the child, and she fell, hitting her head on a table. The child was sent to the nurse and swelling occurred. The Board met with the family to discuss the incident. [Testimony Ms. Liberatore, Exhibits B-18, B-19]
16. In May 2003, the family was informed that the Student met with the social worker because he had urinated outside during the recess. [Testimony Ms. Liberatore, Exhibit B-20]
17. On June 5, 2003, the Student threatened three girls at a water fountain that he was going to stab them with a pencil. The Student was suspended for two days for that incident. [Testimony Ms. Liberatore, Exhibit B-21]
18. The Student's behavior progressively got worse in first grade. Academically the Student had showed growth in reading, and he was assigned to second grade at the conclusion of first grade. [Testimony Ms. Liberatore, Exhibit B-22]
19. A PPT was convened at the beginning of the Student's second grade as the classroom teacher was seeing the same problems with the Student. [Testimony Ms. Liberatore] A social worker observation at the beginning of the school year noted that the Student was impulsive, inattentive, easily frustrated and angry. In September 2003, the classroom teacher noted that:

He understands the classroom rules, procedures and routines, however, he doesn't consistently adhere to them. He will respond to questions and share during group discussions often before he is called on or before it is his turn to speak. He is reminded daily not to shout out answers or answer out of turn. [He] has difficulty listening attentively and quietly and following directions the first time they are given. It is difficult for him to work independently and he requires constant one to one assistance/encouragement/support to complete academic tasks. When he is unable to receive immediate attention he may refuse to do his work, yell out "I need help," cry and at times fall asleep. [He] needs daily reminders to keep his hands and feet to himself and not hit, push or name call. During group meetings he is reminded to sit up, look and face forward and not fidget with shoes, socks, clothing, markers, dry

erase board, etc. He is also reminded not to disturb his neighbor. When [he] is frustrated he will also have a tantrum, cry loudly and roll around on the floor. The quality of [his] work is poor. Handwriting is not legible at times, papers are often torn, crumpled, erased poorly or crossed out or marked over. This happens especially when he doesn't receive immediate attention. [His] DRA instructional level is 16. He reads very slowly with little expression. He has a tendency to add words when reading. He also loses his place while reading. His writing skills are also weak, he is encouraged to develop his own thoughts and ideas, he tends to copy his responses from teacher-modeled lessons instead. [He] can solve addition facts to ten using manipulatives. However, he tends to want to play with manipulatives instead of using them as an aid. Although he understands the addition concept he still requires one to one assistance to stay on task. [He] has a behavior plan whereby he is earning marbles for positive behavior. Despite the opportunity of a reward, [he] is having difficulty with the system. [He] also frequently requests to use the bathroom. [He] is constantly in motion with his body, he taps on any surface near him.

[Testimony Ms. Liberatore, Exhibit B-23]

20. The PPT convened on September 23, 2003. At this PPT meeting, evaluations were recommended. The Parent consented to the evaluations, which were to include a psychological evaluation, a social work developmental history and an academic evaluation. [Testimony Ms. Liberatore, Exhibit B-26]
21. The Student continued to exhibit behavior problems in second grade. [Testimony Ms. Liberatore] On September 25, 2003, the Student was suspended for a half-day for punching a child in the back. The child was treated by the nurse. [Testimony Ms. Liberatore, Exhibit B-27] The Parent was notified of this in-school suspension, and was informed that the next time the Student put his hands on another child he would receive an out of school suspension. [Testimony Ms. Liberatore, Exhibit B-28]
22. When the principal deals with discipline with the younger elementary students, she would generally sit and talk with them, and also give the students a reflection sheet to allow the students an opportunity to explain in writing why they were called to the office, what they did, and what they could do to prevent it from happening again. When the principal met with the Student to reflect on his behavior, he would indicate that he didn't know why he did it. The Student appeared as if he didn't have any control over his body. He was very impulsive. [Testimony Ms. Liberatore]
23. On September 26, 2003, the Student was suspended for two days for deliberately tripping one child, and slapping another child across the face, leaving a red mark. This was only one day after the previous incident. [Testimony Ms. Liberatore, Exhibits B-29, B-30]

24. On October 7, 2003, the Student was suspended for three days for hitting another child in the face. [Testimony Ms. Liberatore, Exhibit B-31]
25. On October 21, 2003, the Student pushed children in line for an apparent reason, and kicked another child in the leg at lunch time. No suspension was given, but the principal directed the classroom teacher to place the Student's desk away from the other children to protect the other children. The principal also reminded the Parent that the evaluations were pending at this time, and asked that the Parent complete the behavior rating scale for the evaluation. [Testimony Ms. Liberatore, Exhibit B-32]
26. As of October 2003, no school interventions were helping to change the Student's behavior. [Testimony Ms. Liberatore]
27. On November 18, 2003, the Parent was contacted because the Student was poking another child in the eye with a pencil because the other child was singing a song incorrectly. The Student was reminded to not be physical or correct other children, and the Parent was asked to speak with the Student to remind him to think before he reacts. [Testimony Ms. Liberatore, Exhibit B-37]
28. The PPT reconvened on November 24, 2003, and the psychological evaluation and the special education teacher's report on academic testing were reviewed. The Student's aunt was upset with the psychological evaluation, and didn't agree with the results. The team agreed that the Student was not eligible for special education and related services as learning disabled. The team agreed to revise the Student's behavior plan, and reconvene to discuss the Student's progress. The school based members of the team did not explore identification under any other category at this PPT, as they were trying to keep the family's support of the Student's education. [Testimony Ms. Liberatore, Exhibit B-38]
29. The Student's behavior got worse as the year progressed. [Testimony Ms. Liberatore] On January 12, 2004, the Student was suspended for touching a female student's buttocks. [Testimony Ms. Liberatore, Exhibit B-39] On March 1, 2004, the Student was suspended for four days for telling two girls to "suck his private parts." At this time, the Student's inappropriate behavior had escalated. [Testimony Ms. Liberatore, Exhibit B-40]
30. On March 10, 2004, the Student pushed a table into other students, injuring one of the students. This again resulted in a suspension for the Student. [Testimony Ms. Liberatore, Exhibit B-41]
31. In March 2004, the Student's classroom teacher had developed an individual student plan for the Student. This regular education intervention plan is developed for children who are having academic problems, which provides for strategies to help children succeed. [Testimony Ms. Liberatore, Exhibit B-42]

32. On March 24, 2004, the Student told his teacher and that boys and girls in his class that he was going to kill them with a big knife and then kill himself. The principal met with the Student, who told her that he said this because he hates school. When asked if he ever felt this way before the Student stated that his aunt told him never to say that at school. The principal requested that the social worker speak to the Student's family regarding a referral to Mid Fairfield Guidance Center, for counseling service. The family did follow up with Mid Fairfield for counseling services for the Student. The Student was suspended for 10 days for this incident. [Testimony Ms. Liberatore, Exhibit B-43]
33. The PPT reconvened on April 6, 2004. At this PPT, the team agreed to a diagnostic placement for the Student. The diagnostic placement provided for five hours of special education services, a paraprofessional to assist the classroom teacher and social work assistance. The family also agreed to a psychiatric evaluation by Dr. Gallo. At this time, the Student was being seen by a therapist at Mid Fairfield. Subsequently the school learned that the Student ceased seeing the therapist at Mid Fairfield, as the aunt called that program racist. [Testimony Ms. Liberatore, Exhibits B-45, B-46]
34. On April 15, 2004, the Student received a one day in-school suspension for pushing his teacher when she told the Student she was going to call his aunt. [Testimony Ms. Liberatore, Exhibit B-49, B-52]
35. The classroom teacher provided a report about the Student on April 26 wherein she noted that the Student was argumentative and combative. This was affecting relationships with the Student's peers. The teacher reported that the Student had no friends in the second grade classroom. [Testimony Ms. Liberatore, Exhibit B-51]
36. At the time of the diagnostic placement, the Student was working on improving phonological awareness and auditory processing, working on grade-level math skill reinforcement and receiving pre-teaching skills in weekly homework pack. The special education teacher reported that impulsivity continues to be an issue for the Student and that he continues to try to "call the shots." [Testimony Ms. Liberatore, Exhibit B-53]
37. The PPT reconvened on April 27, 2004, and agreed to continue the diagnostic placement. The Student was making some progress in the diagnostic placement, but was still exhibiting problematic behaviors. As of this PPT, Dr. Gallo's full psychiatric evaluation was not received. The PPT was scheduled to reconvene on May 11, 2004 so that Dr. Gallo's report could be reviewed. [Testimony Ms. Liberatore, Exhibit B-54]
38. Dr. Cornelia Gallo conducted the psychiatric evaluation. She interviewed the mother and the maternal aunt, as well as the Student. She spoke with the Student's therapist at Mid Fairfield Guidance Center, and interviewed the

classroom teacher. She also observed the Student in the classroom, reviewed the prior psychological evaluation, special education teacher's report, social work assessment, teacher reports and PPT meeting summaries. The diagnostic summary of the Student indicates:

[The Student] is a 7.5 year old African American boy living with his mother, maternal aunt and three siblings attending second grade at The Columbus Magnet School in Norwalk, Connecticut. [The Student] has a long history of behavioral dyscontrol including hyperactivity and impulsivity that has escalated to physically aggressive and disrespectful behavior daily in the setting of completing little work and alienating his peers. [The Student's] constellation of oppositional aggressive behaviors, inattention, hyperactivity, and impulsivity meet the requirements for Oppositional Defiant Disorder, and Attention Deficit Hyperactivity Disorder. [The Student's] self reported anxiety symptoms and worries are clearly of clinical concern and need to be addressed immediately, and seem indicative of Anxiety Disorder, not otherwise specified. [The Student] seems a young boy at HIGH [sic] risk for greater psychopathology. His mood instability, quick irritability and grandiosity put him at risk for a mood disorder, possibly bipolar disorder. His intellectual functioning and adaptive skills qualify him for a diagnosis of Borderline Intellectual Functioning.

[Testimony Ms. Liberatore, Exhibit B-56]

39. Dr. Gallo's conclusions in her diagnostic summary were consistent with what the principal saw in the Student. [Testimony Ms. Liberatore]
40. Dr. Gallo opined that the Student's behavioral problems and emotional instability qualify the Student for special education under the seriously emotionally disturbed category. She noted that the Student needs to be closely supervised, frequently redirected and engaged in the educational process, noting that this would likely require 1:1 active supervision. Dr. Gallo recommended that the Student have a more structured school program, and that any suspensions should be completed in school, rather than out of school. Dr. Gallo recommended that the Student's work assignments be the type that can be completed in a time consistent with his five to seven minute attention span. She also noted that he needed a new behavior modification system, with very frequent rewards. Dr. Gallo suggested that if the Student's physical behavior continues unabated, that it would be reasonable to consider placement in a different type of setting more equipped to handle that level of necessary physical intervention. [Exhibit B-56]
41. Dr. Gallo's recommendation for very frequent rewards in the behavior plan was put into effect shortly upon receipt of this report. In addition, a one to one aide was hired to work with the Student. [Testimony Ms. Liberatore, Exhibits B-56, B-58, B-59] The Student's compliance increased initially with the aide, but after four days the Student returned to his previous noncompliant mode. [Testimony Ms. Liberatore, Exhibit B-59]

42. On May 11, 2004, the PPT reconvened to review Dr. Gallo's report. The Parent did not attend this PPT, but the Student's aunt was present. Because the Parent was not present, the PPT deferred discussion of the Student's eligibility. The Parent's presence at the PPT was critical to that discussion regarding eligibility. [Testimony Ms. Liberatore, Exhibit B-60]
43. The Student received an in-school suspension on May 12, 2004, for pushing a classmate and repeatedly threatening to kill her. This was an in-school suspension, in accordance with Dr. Gallo's recommendation. [Testimony Ms. Liberatore, Exhibit B-61]
44. The PPT reconvened on May 25, 2004 to determine eligibility for the Student. The Parent attended this PPT. At this PPT, the school based members of reviewed the eligibility and criteria for special education under the category of Seriously Emotionally Disturbed [SED], and agreed that the Student qualifies for special education as SED. The Parent did not agree with the eligibility designation, but said she would review the documents. The team received the Student's proposed Individualized Education Program [IEP]. The Parent indicated that she wanted the services, but didn't want the Student to be labeled. [Testimony Ms. Liberatore, Exhibit B-65]
45. The Student continued to have behavioral problems. On May 28, the Student received an in-school suspension for hitting another student and a teaching assistant. [Testimony Ms. Liberatore, Exhibit B-67]
46. The principal sent a correspondence to the Parent, urging her to reconsider her position about the Student's eligibility for special education, and noting that the Board would proceed to due process regarding this issue. [Testimony Ms. Liberatore, Exhibit B-67]
47. The Student was retained in second grade for the 2004-2005 school year due to the lack of academic growth. [Testimony Ms. Liberatore, Exhibit B-69]
48. The principal believes the Student requires special education services under SED because things progressively escalated, despite the many interventions in place. The Student is a very angry little boy who has no control over himself. He's a danger to himself and to others. [Testimony Ms. Liberatore]
49. The Student was enrolled at the Board's Kendall elementary school for the 2004-2005 school year. The Student has continued to have physical outbursts and difficulty in staying on task. Within the first five minutes of the first day of school, the Student pushed another boy. On that same day at the playground, the Student hit a girl on the arm. In the afternoon, he elbowed a student teacher and pushed two children in the afternoon. On the second day of school, the Student

- spit on the floor, hit others and drew on a table. On the third day of school, the Student pushed a girl to the ground. [Testimony Ms. Corey, Exhibit B-77]
50. The outbursts continued in the second week of school. The Student had difficulty on a spelling test and threw a big plastic basket across the room. On that same day, the Student was kicking someone's wheeling backpack, and then pushed the Student. The teacher took his hand, and he swore at the teacher, and tried to pull the teacher over his shoulder. The Student then body slammed the teacher into a wall and injured her finger. When the teacher spoke to him the next day about the incident, he appeared to hardly remember it. [Testimony Ms. Corey, Exhibit B-77]
51. On September 9, the Student threw a chair over a table, and hit a girl in the shoulder and the leg. On September 20, the Student was in the classroom, and straddled a boy who was lying down on the ground, and was punching him. On September 21, the Student began banging his head with a book, and was growling. [Testimony Ms. Corey]
52. This school year, the Student has constant verbal issues. He is frequently talking out, and makes noise with things. It is difficult teaching him in the classroom, as the teacher has to redirect him all the time. There is absolutely no way to predict what will trigger a behavior, according to the Student's current teacher. The Student continues to have problems with his penmanship in his fine motor skills. [Testimony Ms. Corey]
53. On the first day of school this year, the Student's classroom teacher spoke with the Student regarding his behavior. The Student told her that he's been bad since the day he was born. The Student explained to her that he has a good part of the brain and a bad part of the brain, and the bad part of the brain always wins. [Testimony Ms. Corey]

CONCLUSIONS OF LAW:

1. The Board has brought this action seeking to determine the eligibility of the Student, and to override the Parent's lack of consent for provision of special education services. The Individuals with Disabilities Education Act [IDEA], 20 U.S.C. Sec. 1401, et seq, and its regulations are silent with regard to the issue of overriding parental consent for initial placement prior to the 1997 reauthorization of IDEA, and remain silent to date.
2. In *Letter to Yudien*, 38 IDELR 267 (2003), the Office of Special Education Programs [OSEP] reiterated its position that it does not believe the due process procedures allow for the Board to bring an action to override consent for the initial provision of special education or related services. The essential basis of OSEP's position was that the IDEA statute and regulations expressly provide for overriding lack of consent in evaluations, but no such express provision allows

- for overriding the lack of consent for an initial placement. Deference to an OSEP policy letter may be appropriate where the statutory language is ambiguous, but such letters are not binding authority. *See e.g. Individuals with Disabilities Education Act Amendments for 1997*, Pub. L. NO. 105-17, Sec. 101, Sec. 607(f)(1), 111 Stat. 37, 48 (codified at 20 U.S.C.A. Sec. 1406(f)(1)(West 2000))(requiring the Secretary of Education to include in written responses to policy questions “an explanation that the written response is provided as informal guidance and is not legally binding.”) *St. Johnsbury Academy v. D.H.*, 240 F. 3d 163 (2nd Cir. 2001)
3. Hearing Officers in other jurisdictions have found that the local educational agency [LEA] has the right to utilize IDEA’s due process proceedings to override a parent’s refusal to consent to the initial provision of special education services for a child with a disability. *See, e.g., Houston Independent School District*, 38 IDELR 202 (Texas SEA 2002), *In re: Student with a Disability*, 41 IDELR 197 (Kansas SEA 2004), *Clover Park School District*, 36 IDELR 84 (Washington SEA 2001), *Galena Park Independent School District*, 41 IDELR 221 (Texas SEA 2004) These decisions share the conclusion that allowing for a process to override a parent’s refusal to consent to the initial provision of special education services is consistent with the purpose of IDEA, and consistent with the due process procedures of the IDEA. While IDEA is silent on the use of due process procedures to address the lack of parental consent for initial placement into special education, its general provision pertaining to due process hearings allows LEAs to initiate due process hearings on any matter related to the identification, evaluation, educational placement or the provision of a free appropriate public education to a child with a disability. *Galena Park Independent School District, supra, citing* 34 C.F.R. Sec. 300.507
 4. This analysis of the procedures is also consistent with the general purpose of IDEA, which has been described as “an ambitious federal effort to promote the education of handicapped children.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F. 3d 199, 122 (Second Cir. 1998) In accordance with the Act, states that receive funding from Congress are required to provide “all children with disabilities” with a “free appropriate public education” which must include special education and related services tailored to the unique needs of a particular child, and must be reasonably calculated to enable the child to receive educational benefits. *M.C. v. Voluntown Board of Education*, 226 F. 3d 60 (Second Cir. 2000), *citing Board of Educ. V. Rowley*, 458 U.S. 176 (1982) The Student’s unique needs cannot be met without a process to allow the LEA to seek a hearing to override the Parent’s refusal to consent to services.
 5. Many regular education interventions have been attempted for the Student. None of these have remained successful. The Student, who is turning eight in a matter of days, remains at risk. The Parent wants the services, but not the “label.” In this era of “no child left behind” the Student would indeed be left behind if the Board did not proceed with this action to override the Parent’s refusal to consent

- to eligibility and provision of initial services. Therefore, the Board is entitled to proceed with this due process action to override the Parent's lack of consent.
6. It remains to be considered whether the Student is a child with a disability in accordance with IDEA. The term "child with a disability" means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. Sec. 1401(3), 34 C.F.R. Sec. 300.7(a)(1) The school based members of the PPT have determined that the Student is eligible for services under the designation of Serious Emotional Disturbance.
 7. Emotional disturbance is defined under the federal regulations as follows:
 - (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
 - An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - Inappropriate types of behavior or feelings under normal circumstances;
 - A general pervasive mood of unhappiness or depression;
 - A tendency to develop physical symptoms or fears associated with personal or school problems;
 - (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance. 34 C.F.R. Sec. 300.7(c)(4)
 8. If, after evaluation, a child is found to have an emotional disturbance, the team must also find that the child, by reason of this condition, requires special education. 34 C.F.R. Sec. 300.7(a)(1). Special education is defined as "specially designed instruction". 34 C.F.R. Sec. 300.26(a)(1). Specially designed instruction means adapting "the content, methodology, or delivery of instruction...to address the unique needs of the child...[and]...ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children". 34 C.F.R. 300.26(b)(3)
 9. Taking these requirements together, in order to find a student eligible for special education services as a child with having a Serious Emotional Disturbance [SED], the Planning and Placement Team (PPT) must find that the student exhibits one of five characteristics of emotional disturbance (1) over a long period of time (2) to a marked degree, such that it (3) adversely affects the student's educational

performance, (4) causing the child to require specially designed instruction in order to receive a free appropriate public education. The school based members of the PPT properly determined that the Student should be identified as eligible for special education due to his serious emotional disturbance as he has an inability to build and maintain satisfactory interpersonal relationships with peers and teachers, for a long time, to a marked degree which has an adverse effect on his educational performance. [Exhibit B-65] The child requires specially designed instruction in order to receive a free appropriate public education. 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.

10. The Board has properly determined that the Student is eligible for special education and related services, and has proposed an appropriate Individualized Educational Program for the Student, one that is subject to revision as necessary in light of the Student's deteriorating behavior and in accordance with the recommendations set forth in the evaluations. An appropriate IEP is one that is reasonably calculated to enable the child to receive educational benefits. IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* The goal of IDEA is not to maximize a special education child's potential, but rather to provide access to public education for such children. *K.P. v. Juzwic*, 891 F. Supp. 703, 718 (D.Conn. 1995). The Board's proposed program, based on the Student's evaluations, is carefully drafted so that the Student can derive such meaningful educational benefit, a benefit he cannot derive in the absence of special education and related services.

FINAL DECISION AND ORDER:

1. The Student is eligible for special education and related services with a primary disability of Serious Emotional Disturbance. The Board properly made this determination at the PPT of May 25, 2004.
2. The Student's Individualized Educational Program of May 25, 2004 is appropriate, and shall be implemented.
3. The Board shall convene a PPT within ten days of the issuance of this order to identify the Student as eligible for special education and related services, review the Student's IEP, revise the Student's IEP if necessary based on the Student's current level of performance and to determine whether any changes or further assessments are required to deliver a free appropriate public education to the Student.

