

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Westport Board of Education

Appearing on behalf of the Parents: Atty. Andrew A. Feinstein, Law Offices of David C. Shaw, LLC,
34 Jerome Avenue, Suite 210,
Bloomfield, CT 06002

Appearing on behalf of the Board: Atty. Michelle C. Laubin, Berchem, Moses & Devlin, P.C.,
75 Broad Street, Milford, CT 06460

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

1. Did the Westport Board of Education offer the Student a free appropriate public education ("FAPE") in the least restrictive environment for the 2004-2005 school year?
2. If not, is Woodhouse Academy an appropriate placement for the Student for the 2004-2005 school year?
3. If Woodhouse is appropriate, is Westport responsible for the costs of Woodhouse and providing transportation for the Student?

PROCEDURAL HISTORY

This hearing was requested on August 31, 2004. The hearing request was in the form of a 17-page letter from Parents' Counsel. Hearing Officer Exhibit (HO) 1. This hearing officer was assigned to the case on September 3. A prehearing conference was held on September 9, 2004. The only issues identified for hearing were on page 17 of HO-1, which are stated below. At the prehearing conference the Parents' attorney stated that the main issue was a disagreement about placement of the student. Hearing dates were scheduled for October 20, 21 and 27. The Parents' attorney requested a 30-day extension of the decision deadline, which was granted. The decision deadline was extended from October 18 to November 18. The parties were directed to file witness lists and exhibits by October 13, which they did. The Parents filed Exhibits P-1 through P-40. The Board filed Exhibits B-1 through B-224. On October 12, the Parents' counsel filed a Motion to Disqualify Atty. Laubin from representing the Board. Atty. Laubin requested seven business days to respond to the motion. On October 15 the Hearing Officer notified the parties that the motion would be heard on the first day of the hearing and allowed Atty. Laubin until October 19 to file her opposition to the motion. She filed a timely opposition brief.

The hearing convened on October 20, 2004. The first matter heard was objections to exhibits. The Board objected to Parent Exhibits containing names of other students. It was agreed that substitute exhibits would be provided with names redacted. All exhibits were then entered as full exhibits. The next preliminary matter was the Parents' Motion to Disqualify Atty. Laubin. Both parties had filed briefs and were heard in oral argument on the Motion. The Parents alleged that Atty. Laubin had been present at three PPT meetings and made comments there, thereby going beyond the role of an attorney. They further claimed that the IDEA makes clear that attorneys are not wanted at PPT meetings and that her presence violated IDEA. The Parents' counsel was asked whether the issue of a procedural violation of IDEA was raised in the request for due process. He claimed it was raised in the first issue. The Parents' attorney claimed that Atty. Laubin was a necessary witness as to the procedural and substantive violations of IDEA, which occurred at the three PPT meetings. The Board's attorney argued that the Parents' witness list did not name Atty. Laubin. She also asserted that any testimony from the Board's attorney would violate the attorney-client privilege and that she was not a necessary witness to what occurred at the PPT meetings. There were documents and other participants who could be called to testify regarding those matters. She also pointed out that the Father is an attorney and that the Parents had an advocate with them at the PPT meetings. The Motion to Disqualify was denied. There was a discussion of the need for more hearing dates. The Parents requested two additional days, for a total of five days, to present their case. The Board requested 3-4 days to present its case. The requests were granted.

The Parents' attorney made an opening statement. He stated that the parties agreed that the Student needs an out-of-district placement. The Parents claimed that the Board's recommended placement would not provide an academic challenge for the Student and that his behavioral needs would not be met there. The Board's attorney waived an opening statement until the start of the Board's case.

The Parents began their case by offering two additional exhibits, P-41 and P-42, which were curricula vitae from two expert witnesses they planned to call. These were admitted without objection. They presented testimony from the Father, Marcia Eckerd, Ph.D., the Student's treating psychologist, Armin Paul Thies, Ph.D., a consulting neuropsychologist, Robert Lepper, Director of Woodhouse Academy, and Demitri Papolos, M.D., the Student's treating psychiatrist, on six days: October 20, 21 and 27 and November 10, 18 and 19. The Board presented testimony from Fred Rapczynski, Ph.D., school psychologist, Dominique Fontaine, Executive Director Lorraine D. Foster Day School (LDFDS), Daniel French, Ph.D., Unit Director Cooperative Education Services (CES), G. Davis Gammon, M.D., consulting psychiatrist, and Peggy Bud, Coordinator Private School Special Services, on five days: November 22 and 23, December 2 and 17, 2004 and January 6, 2005. During the course of the hearing the Parties offered additional exhibits, which were admitted into evidence. These were P-43 through P-50 and B-225 through B-235. The decision deadline had been extended to December 28, 2004, then to January 11, 2005 and then to January 31 to accommodate the additional hearing dates. At the close of the hearing on January 6, the parties requested 30 days to file simultaneous briefs, which was granted. The briefs were due on February 7, 2005 and the decision deadline was extended to March 4, 2005. Both parties filed briefs. On February 11, the Board's attorney filed a request to strike portions of the Parents' brief pertaining to procedural violations and other issues, which were not raised at the hearing. In the alternative, the Board's attorney requested permission to file a reply brief. The Parents' attorney objected to the requests. On February 14, the Hearing Officer denied the motion to strike and granted the request to allow the parties to file simultaneous reply briefs on or before February 22. The decision deadline was extended to March 15. Both parties filed reply briefs. The Parents' briefs total 140 pages plus a 31-page appendix containing summaries of witness testimony. An attachment to the reply brief, which consisted of additional evidence that was not offered during the hearing, was the subject of a letter from the Board's attorney on February 23. She asked that the material be stricken from the record and that the Hearing Officer reference the inappropriate conduct of the Parents' attorney in this decision. Parents' attorney wrote on February 24 and asked that the material be stricken from the record. Both attorneys made

various allegations in the briefs against the conduct of the opposing attorney. The Parents' attorney requested sanctions against the Board and Atty. Laubin. She asked for the Hearing Officer to condemn Atty. Feinstein's conduct in a comment section, which the Hearing Officer has the authority to include. 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.

SUMMARY

In their due process request, the Parents offer a detailed history of the Student since preschool. He attended public school in the Westport school system from kindergarten until the early part of grade six, when his parents agreed to placement at the LDFDS, a state-approved private therapeutic day school for children ages 8 to 21 with emotional and learning disabilities. The Student completed the remainder of grade six and all of grade seven there. In or around February 2004 the Parents began to explore other options for the Student because they did not think LDFDS was academically challenging enough and they had some disagreements with the school's Executive Director. The Parents chose Woodhouse Academy in Milford, a private non-approved school for high school age students with emotional and other disabilities. The Parents endeavored to persuade the Board at several PPT meetings in April and June 2004 to place the Student at Woodhouse. The Board refused that placement and instead recommended CES therapeutic day program in Trumbull. CES is a Regional Educational Service Center (RESC), which serves towns in the Westport area. The Parents claim that the CES program is more restrictive and less academically challenging than Woodhouse. They claim that the Board committed numerous procedural violations of IDEA, which resulted in a denial of FAPE to the Student. The Board claims that the Parents did not raise any procedural violations at the hearing, but disagreed only with the program and placement recommendation of the June PPT meetings.

FINDINGS OF FACT

1. The Student (date of birth 11/7/91), also referred to herein as A., is currently 13 years of age. Testimony of Father; Exhibits B-1.
2. A. currently attends a private school, Woodhouse Academy, which is not approved by the State Department of Education. Woodhouse, which opened in February 2003, has 14 students, including A., in grades eight through twelve, all of whom are disabled. Testimony of Robert Lepper and Peggy Bud.
3. A. attended Westport public schools from kindergarten through grade five at Coleytown Elementary School. He was in regular education classes and had no academic difficulties, however, he had problems in unstructured time such as recess and lunch. Dr. Rapczynski was able to effectively work with A. on social and behavioral issues throughout this time. A. was referred to special education twice prior to grade five, but his Parents did not want to have A. evaluated by school staff. In grade five, the behavior problems began to appear in classroom settings. On October 4, 2001 a PPT meeting recommended a full evaluation. The Parents agreed to an evaluation. Exhibits B-82; Testimony Father and F. Rapczynski.
4. After initially signing consent for a comprehensive evaluation at the October 4 PPT meeting, the Parents later wrote to Cynthia Gilchrist, Director of Pupil Personnel Services, and listed numerous complaints about the accuracy of the PPT minutes and certain incidents at school. The Coleytown Principal, Kaye May, responded to the letter. The evaluations in the record are the developmental and health history done by the school nurse and social worker and an independent assessment done by Dr. Thies. Id.; Exhibits B-82; B-86; B-89; B-91; B-93; B-94.

5. At a PPT meeting on February 28, 2002, during grade five, A. was found eligible for special education and related services under the category of serious emotional disturbance (SED). The basis of the determination was a neuropsychological evaluation by Dr. Armin Thies. Exhibit B-103; Testimony, F. Rapczynski.
6. The eligibility determination was a unanimous team decision, although there was disagreement between the Parents and the school-based team on the types of behavior interventions to be used. Id.; Testimony, Father.
7. In October 2001, the Student began treatment with general psychiatrist Dr. Demitri Papolos. Dr. Papolos made a diagnosis of Bipolar Disorder Not Otherwise Specified (NOS) and Separation Anxiety Disorder. Exhibit B-85; Testimony, Father and Dr. Papolos.
8. Dr. Thies evaluated the student in November and December 2001 and found that the major areas of concern were social behavior and math. He agreed with the bipolar disorder diagnosis made by Dr. Papolos. He concluded that the Student's "primary handicapping condition is SED, with secondary conditions of neurologically impaired, i.e., epilepsy, and an executive disorder, although a severe, adverse effect on achievement caused by the executive disorder is not yet evident." B-99.
9. Dr. Thies made a series of recommendations to be incorporated into the Student's educational program in the event that the PPT reached the conclusion that the Student was eligible for special education services. Id. These were discussed at the February 28, 2002 PPT meeting. Id.; B-103.
10. Dr. Thies recommended, and the Parents provided consent for, additional achievement testing to be conducted in the area of math to rule out a learning disability in that area. Goals and objectives were proposed and accepted in the areas of written expression, problem solving, and behavior. The PPT proposed a program for the Student which would maintain his placement in the regular 5th grade classroom at Coleytown Elementary School, but would provide him with the support of a paraprofessional in the regular classroom for academic subjects 16.75 hours per week, direct instruction by special education staff for written expression 1.0 hour per week, and support by the school psychologist 1.2 hours per week. The Parents provided their written consent for the initial placement in special education. Exhibits B-103 and B-106; Testimony, F. Rapczynski.
11. The Parents and Dr. Thies submitted comments and recommended changes to the IEP in March and April. Exhibits B-109 and B-113. These were discussed at a PPT meeting on April 9, 2002. Exhibit B-117.
12. On April 11 a PPT meeting was held to formulate a program and transition to grade six. At that meeting, all participants, including the Parents, agreed to a program placing the Student at Coleytown Middle School for 6th grade. It was agreed that the Student would receive in-class special education services 7.0 hours per week to support his progress on IEP goals and objectives in the areas of written expression, problem solving, reading comprehension, organizational skills, and appropriate use of technology. In addition, it was agreed that the Student would receive counseling 1.25 hours per week to address goals in the areas of communication, self-awareness, anxiety control, and decreasing inappropriate outbursts. Exhibit B-118; Testimony, F. Rapczynski.
13. On May 29, 2002, another PPT meeting was held to determine whether the Student's conduct of threatening to kill another child was a manifestation of his disability. The team, including the Parents, agreed that the Student's misconduct was a manifestation of his disability, and that counseling would be provided to address the Student's conduct. Exhibits B-120, B-121, B-122; Testimony of F. Rapczynski.

14. A. made satisfactory progress on most of his goals and objectives for grade five. Exhibit B-127.

15. On June 25, 2002, the Parents wrote to the Coleytown Elementary School principal, Kaye May, with several requested changes to the minutes of the May 29 PPT meeting and asked that she not be involved with A.'s transition to the middle school. The Parents outlined their grievances against Ms. May, including her failure to investigate and stop bullying of A. on the playground and school bus and her lack of authority to suspend A. from school prior to the manifestation PPT meeting. Exhibit B-129; Testimony, Father.

16. On August 5, 2002, the Parents wrote a similar letter to the Superintendent of Schools requesting that the suspension be expunged from the school and district records. Exhibit B-132; Testimony, Father. On September 24, 2002, a follow-up letter was sent to the Superintendent requesting a reply. Exhibit B-134. The Superintendent responded to the Parents on October 16, 2002, and stated that an investigation was conducted, no wrongful conduct was found on the part of the school staff and the suspension was not expunged. Exhibit B-145.

17. On October 8, 2002 a PPT meeting was held to discuss A.'s progress in grade six. He was not adjusting well to the middle school. Several changes were recommended to his IEP and the Parents were asked to consider an out-of-district therapeutic day placement. They signed a written consent for information to be exchanged with LDFDS and CES. Exhibit B-144.

18. The PPT reconvened on October 21, 2002, revised A.'s IEP and recommended placement for the Student at LDFDS, an approved special education day school located in Hamden, Connecticut. The Parents provided written consent for the out-of-district placement commencing October 29, 2002. It was agreed that a PPT meeting would be held in about four to six weeks at Lorraine Foster to review the Student's IEP and make any necessary revisions. The Behavior Intervention Plan (BIP) developed for use with the Student at Coleytown Middle School called for the use of "time out" in the form of time for the Student to calm down and regroup, as well as other forms of removal from the school setting when necessary. This BIP followed the Student to LDFDS. Exhibit B-146.

19. On December 3, 2002 a PPT meeting was held at which LDFDS presented an IEP and a Functional Behavior Plan for the Student. The Parents agreed with the IEP and did not present any complaints about LDFDS. Exhibit B-150; Testimony, Ms. Fontaine.

20. A. attended LDFDS for the remainder of grade six. At the annual review PPT meeting on May 29, 2003, the Parents expressed satisfaction with the placement. An IEP and behavior plan were developed for the Student. B-166; Testimony, Father, Dominique Fontaine and Peggy Bud. There were no Parent letters regarding any corrections or additions to the December 3, 2002 or May 29, 2003 PPT meetings. A. attended LDFDS for all of grade seven. *Id.*; Exhibits B-149 through B-220. On February 28, 2003, the Student was given a two-day out-of-school suspension for throwing a sponge at another student, breaking a clipboard, and overturning a table when he became angry. Exhibit B-157. A. received a one-day in school suspension on June 4, 2003 for damaging another student's artwork. Exhibit B-170. On September 23, 2003, A. received a two-day out of school suspension for threatening (throwing objects from the wall) and verbal abuse (refusing to follow staff directions). Exhibit B-172. A. was "Student of the Week" for three consecutive weeks in January 2004. Exhibits B-181 through B-183.

21. In or around February 2004, the Parents decided that the Student would not return to LDFDS for grade eight. They requested a PPT meeting, which was scheduled for March 11, 2004. Testimony, Father; Exhibit B-186. It was rescheduled for March 16. Exhibit B-189. It was eventually held on April 13, 2004. Exhibit B-196.

22. On April 7, 2004 at 10:03 p.m., the Parents faxed a letter to Ms. Fontaine requesting records to be provided to them in advance of the April 13 PPT meeting, "no later than April 9." They asked for copies of "any and all written updates, assessments, proposed revisions to the IEP, documentation necessary to support your assessments of achievement of the PPT goals and objectives and other documentation that you are proposing to review at the PPT." Exhibit B-192.

23. On April 7, 2004, the Parents sent a letter to Ms. Bud in which they noted that the Board attorney, Michelle Laubin, was listed as invited to attend the PPT meeting. The letter stated: "While we will not object to Ms. Laubin's presence at the April 13 PPT meeting, this should in no event be taken as our consent to such practice now or at future PPT's." The letter also outlined a number of issues the Parents wanted to raise at the PPT meeting. Exhibit B-193. Ms. Bud answered the letter on April 12. Exhibit B-194. The same day the Parents sent a reply letter to Ms. Bud in which, among other things, they stated "we are concerned with your motives in making false accusations in writing." Exhibit B-195.

24. The attendees at the April 13 PPT meeting were the Parents, Ms. Bud, A.'s teacher from LDFDS, Sheri Casanova, Ms. Fontaine, Paula Krampitz, school psychologist from Bedford Middle School, Atty. Laubin and Noreen O'Mahoney, Parent Advocate. Exhibit B-196. The team recommended a psychiatric evaluation in order to program for the 2004-05 school year, that Parents visit Bedford Middle School and that Bedford staff observe A. at LDFDS and communicate with staff there. Ms. Fontaine brought the documents requested by the Parents in their April 7 letter, but the Parents' advocate said they did not need to see them. Ms. O'Mahoney said they did not believe LDFDS staff could demonstrate measurable gains by A. Ms. Fontaine did not believe A. was ready to transition to Bedford Middle School. The Parents asked for another PPT meeting without staff present from LDFDS. The team refused a reevaluation by Dr. Thies. The next meeting was scheduled for June 8 at which time the team would present goals and objectives. Id. and Testimony, Father, Ms. Fontaine and Ms. Bud.

25. Ms. Bud wrote a reply letter to the Parents' April 12 letter on April 28. She also indicated that Parents had agreed to a psychiatric evaluation to be performed by Dr. Gammon, but had some issues with the consent form. Exhibit B-198. The Parents wrote back on May 7 to say that, among other things, their consent to Dr. Gammon's evaluation was dependent upon a list of the assessments he would perform. Exhibit B-201. On May 10, Ms. Bud sent the Parents new consent forms for the psychiatric evaluation. Exhibit B-203. The Parents signed the forms on May 13, 2004. Exhibits B-204 and B-206.

26. At the Parents' request the June 8 PPT meeting location was changed from LDFDS to Staples High School. Exhibits B-208 and B-209. On May 28 the Parents sent Ms. Bud a letter requesting all documents to be used at the PPT to be provided not later than June 3. Exhibit B-210. On the same date they sent Ms. Bud another letter with their analysis of therapeutic programs in the area including Hall-Brooke (Seton Academy), Cedarhurst Academy, CES, LDFDS and Woodhouse Academy. The Parents stated: "We know that A[.] continues to require a therapeutic educational environment of a type not available at the Bedford Middle School. Your comments and those of Dominique Fontaine at the most recent PPT confirm that view." They concluded that Woodhouse Academy was the only appropriate placement for A. Exhibit B-211; Testimony, Father.

27. On June 3 the Parents wrote a letter to Ms. Bud outlining numerous corrections and additions, which they wanted appended to the April 13 PPT minutes. In that letter the Parents reiterated that: "We were not then and are not now of the belief that Bedford can provide A[.] with a free and appropriate public education in the least restrictive environment." Exhibit B-213.

28. On June 4 Ms. Bud sent the Parents the documents she intended to use at the PPT meeting on June 8, which were her observation reports at LDFDS and Woodhouse. Exhibit B-214.

29. On June 8 the following persons attended the PPT meeting: Ms. Bud, the Parents, Ms. Casanova (LDFDS), Paula Krampitz, school psychologist, Bedford Middle School, Atty. Laubin, Christine Kirschenbaum, Asst. Director, LDFDS, Dr. French, Denise Emmerthal, Vice Principal, Bedford Middle School, Dr. Eckerd, Dr. Gammon and Noreen O'Mahoney, Parent advocate. Cynthia Gilchrist and Ms. Fontaine, although not signed in, were present since the minutes mention them. Ms. Fontaine gave a report on A.'s progress to date at LDFDS. She also described an incident on June 1 at the school where the Student was being defiant of her and nearly pulled a heavy piece of artwork off the wall. She called the Mother and the local police department's youth division. They sent an officer to wait with the Student until his Mother picked him up. He received a two-day out of school suspension and loss of privileges for off-campus trips. The Parents did not want to send A. back to LDFDS. They claimed he was unsafe there. The PPT determined that A. had completed the requirements of seventh grade and the school year would be complete as of June 1. Ms. Fontaine also presented draft goals and objectives for the 2004-05 school year. Parents' advocate asked that the team review the strengths and weaknesses and proposed goals and objectives. She said the Parents did not think any of the goals and objectives were appropriate. After discussion the school team and the Parents agreed that A.'s academic skills in math computation and written expression need to be worked on and agreed on the social-emotional goals. Exhibit B-215; Testimony, Ms. Fontaine, Father and Ms. Bud.

30. Dr. Gammon orally reported on the results of his psychiatric evaluation of the Student. His oral report at the PPT meeting was consistent with his later written report, issued July 19, 2004. Dr. Gammon diagnosed the Student as having Communication Disorder NOS, Learning Disorder NOS, Bipolar Disorder NOS, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder. Dr. Gammon concluded that the Student was unable to benefit from special education programming within the Westport Public Schools, and recommended continued placement in a special education therapeutic day placement. He said that CES had been a good placement for several of his patients with conditions similar to A. Id. and Exhibit P-37; Testimony, Dr. Gammon. Because of the acrimonious atmosphere at the PPT meeting, Dr. Gammon did not feel comfortable with making an outright recommendation of CES as a placement. At the hearing, however, he testified that CES was an appropriate placement for A. Testimony, Dr. Gammon.

31. The team minutes state: "Given the goals and objectives agreed upon by the team today and the recommendations made as a result of the psychiatric evaluation by Dr. Gammon, the parents agreed it was appropriate for the PPT to consider needed services and placement for the 2004-2005 school year." The "Westport staff" believed CES was the appropriate placement for the Student. Woodhouse Academy was refused. The team agreed to meet again to discuss the Parents' proposals for revising the draft goals and objectives. Exhibit B-215.

32. On June 17 a notice was sent to the Parents regarding a PPT meeting for June 22. Exhibit B-217. On June 21 the Parents' advocate Ms. O'Mahoney, sent the Parents' proposed revisions to the goals and objectives for discussion at the June 22, 2004 PPT meeting. Exhibit B-218. On June 22, the PPT meeting discussed each goal and objective at length. The principles were agreed on, but the specific wording on each was not agreed to by the Parents. Parents' math goal and objectives were accepted nearly verbatim. The written expression goal and objectives were similar to those adopted. This was also true for the academic organizations skills goal and objectives and the interpersonal skills development goal and objectives. The remainder of the goals and objectives requested by Parents were: developing self-awareness to accurately evaluate his performance and create appropriate goals for himself; increase his ability to be flexible and consider alternatives; and increase his frustration tolerance. These were addressed in the IEP goal: develop and exhibit constructive behaviors towards people, tasks and ideas; and five objectives. Exhibits B-218 and B-219. Woodhouse Academy was again rejected as a placement for A. Exhibit 219; Testimony, Ms. Bud.

33. On June 27, the Parents wrote to Ms. Bud with several pages of changes and additions to the June 8 PPT minutes. Exhibit B-221. It does not appear in the minutes or in the Parents' letter that they objected to the presence of Dr. French at the PPT meeting. He was also present at the June 22 PPT meeting along with two other CES staff members. No objection was stated. Exhibit B-219.

34. CES Therapeutic Day Program (hereinafter referred to as CES) is a "regional special education public school placement for children and adolescents who present with a variety of emotional and behavioral difficulties. Elementary, middle, and secondary students in the Fairfield County area, who are referred by their local school districts, are eligible for placement in the program. The program offers a comprehensive treatment approach aimed at improving a student's behavioral, emotional, social and academic function, with the goal of having the student return to a school placement within his or her local school district." Exhibit P-37. CES provides small classes of no more than eight students, taught by certified special education teachers. CES has the full complement of related services personnel on staff and available to meet students' needs, including social workers, school psychologists, school counselors, physical therapists, occupational therapists, speech and language pathologists, and a school nurse. Id.

35. The Director, Dr. French, is both a licensed clinical psychologist and certified school psychologist, as well as certified school administrator with extensive experience treating children and adolescents with emotional disturbance in a wide variety of clinical and school settings. CES provides certified physical education teachers and has a full physical education program. School psychologists and other therapeutic staff are trained and available to conduct Functional Behavioral Assessments (FBA's) and regularly provide this service to their student population, in order to develop individualized Behavior Intervention Plans (BIP's). CES is both accredited to provide a full high school education and approved by the State Department of Education to provide special education and related services. CES has a consulting psychiatrist, Dr. Steven Kant, who is available for regular consultations and in-service training to staff, and who is a Board-certified child and adolescent psychiatrist with an "impeccable" reputation in the community. Testimony, Dr. French and Dr. Gammon. CES staff also benefits from the consultation of Dr. Andy Reitz, a nationally renowned behaviorist who regularly provides consultation and in-service training to the staff in behavioral intervention techniques. CES uses a well-defined social skills curriculum implemented in short, focused lessons with role-playing in the classroom and then carried over into the therapeutic milieu by the teaching and therapeutic staff. Exhibits B-229, B-230, B-231; Testimony, Dr. French.

36. CES has in place behavior intervention techniques supported by the research literature in the field to benefit students with Serious Emotional Disturbance (SED) including but not limited to point and level feedback systems, staff trained in Physical Management Techniques (PMT), Time Out areas, areas in the classroom for children to be able to "take space" without leaving the classroom, and counseling provided by appropriately credentialed and experienced staff as needed. The primary modes of intervention used with students, however, are the informal, pro-active, and environmental modifications described by Dr. French: the staff treat students with respect, give them a small, structured environment with clearly defined expectations and lots of positive feedback for their "good" behavior so that they experience success both individually and as a group, and use the principles of "expanding and contracting boundaries" in response to student behaviors. All of these systems are individualized to meet the needs of the individual child and are implemented in an appropriate and flexible manner, in accordance with the individual student's IEP. Individual and group counseling are provided to each student by appropriate therapeutic staff in accordance with the student's IEP, in addition to any consultation that may occur with the student's outside therapist. Students are provided with conflict resolution and anger management training if needed, in accordance with the student's IEP. Id.; Testimony, Ms. Bud.

37. CES currently has 115 students in the therapeutic day program in grades K-12. The students mainly have SED labels. There are 12 classrooms for grades K-8 and 6 classrooms for grades 9-12. Academics are an important aspect of the program. Motivating, engaging and interesting assignments and lessons are important because boredom leads to behavior problems. All students get both individual and group counseling. There are currently 25 students with bipolar disorder. Based on Dr. French's review of Dr. Thies', Dr. Gammon's and Dr. Papolos' evaluations of A. and information he gleaned from the PPT meetings, he was confident that A. with his bipolar disorder, ADHD, oppositional defiant disorder and learning disorder would be very compatible with the program at CES. Testimony, Dr. French.

38. CES would have been able to implement the June 8 and 22, 2004 IEPs developed for the Student, including the full time special education program with individualized counseling services, and would be able to complete the Functional Behavioral Assessment (FBA) and develop an individualized Behavior Intervention Plan (BIP) for the Student. CES offered a program for the Student in the least restrictive environment (LRE) for the 2004-2005 school year. Id. and Testimony, Ms. Bud and Dr. Gammon.

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 Parties also agree that A. is a child with an emotional disturbance. 34 C.F.R. Section 300.7(c)(4).

2. The Board has the burden of proof on the appropriateness of the program for the 2004-05 school year, as well as the placement. 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. Sections 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. "Least restrictive environment" is defined as follows under IDEA:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated **with children who are not disabled**, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that such education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. Sec. 1412(a)(5) (emphasis added); 34 C.F.R. Sec. 300.550. FAPE must be provided to disabled children "in the least restrictive appropriate environment." Polera v. Bd. Of Educ., 288 F.3d 478, 481 (2d Cir. 2002). In this case the Student has been placed in a therapeutic day placement since October 2002. This was supported by PPT decisions from 2002 through June 22, 2004. The Parents agreed with the need for a therapeutic day placement. All of the experts who testified at the hearing agreed with it as well, in particular Dr. Thies, Dr. Eckerd, Dr. Papolos and Dr. Gammon. In their post-hearing brief the Parents argue that the Board did not provide adequate documentation to prove that Bedford Middle School was not an appropriate placement. The Parents never raised that issue at any time prior to their post-hearing brief. There was no evidence offered in the hearing that Bedford would be an appropriate placement. Indeed the record is replete with statements from the Parents that A. was not ready to return to the middle school. (After he left Coleytown Middle School to attend LDFDS, his Parents moved within Westport to the area served by Bedford Middle School.) The Parents' argument that Woodhouse Academy is a less restrictive environment than CES misses the point. Both schools have student populations comprised entirely of disabled students. The issue is whether CES is the least restrictive environment on the continuum of placements. 34 C.F.R. Sec. 300.551. The evidence adduced at the hearing and in the exhibits is sufficient to sustain the Board's burden of proof that CES is the least restrictive environment for the 2004-2005 school year.

4. The Parents have raised numerous procedural violations in their brief, which were not articulated at the hearing. An essential and fundamental element of due process is a party's right to present evidence and confront witnesses. If an issue is not identified prior to the hearing, a party is in effect denied this right. Regs. Conn. State Agencies Sec. 10-76h-11(a) expressly grants any party to a hearing conducted pursuant to Sec. 10-76h-7, the right to:

(a) A reasonable opportunity as determined by the hearing officer, to present evidence and confront, cross-examine and compel the attendance of witnesses, including the presentation of evidence which is more than two years old if such evidence is required to rule **on the issues presented** and it meets evidentiary considerations such as relevancy and materiality as ruled upon by the hearing officer.

Emphasis added. Simply identifying an issue as "denial of FAPE" is not sufficient to identify the specific procedural violations alleged. The Parents, represented by a skilled special education attorney, could have and should have specified the claim in the request for due process, but they did not. Conn. Gen. Stats., Section 10-76h(a)(2) states that ". . . *the request for a [special education] hearing shall contain a statement of the specific issues in dispute.*" (Emphasis added). See also Regs. Conn. State Agencies Sec. 10-76h-7: ". . . *the prehearing conference shall simplify or clarify the issues in dispute.*" The only issue discussed at the prehearing conference was the dispute over placement between CES and Woodhouse Academy.

5. Procedural violations must be so serious as to result in a denial of FAPE. Board of Education of the Hendrick Hudson Central School District v. Rowley, supra. In this case the Parents were provided with procedural safeguards under IDEA at the PPT meetings at issue in April and June 2004. The Parents, accompanied by a skilled advocate, fully participated in each PPT meeting. Their views were listened to in the development of the IEP, which was substantially revised after their advocate presented their written proposals after the June 8 PPT. The Parents have not shown that the presence of Atty. Laubin and Dr. French at the PPT meetings denied the Student a FAPE. No objection to their presence was raised by their advocate or the Parents during these PPT meetings. The failure to have a regular education teacher present at the PPT meetings was not raised at that time, nor was it mentioned in the 17-page due process request. Parents further claim a number of violations in the alleged late mailing of various reports and

IEP documents. There is no showing that any of these alleged technical violations of IDEA resulted in a denial of a FAPE to the Student. Amann v. Stow School System, 982 F.2d 644, 652 (1st Cir. 1992).

6. The second prong of Rowley, supra, whether the IEP is “reasonably calculated to enable the child to receive educational benefits,” has also been satisfied. M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed., 226 F.3d 60, 62 (2d Cir. 2000). An appropriate educational program need not maximize the potential of the child. P.J. by W.J. v. Conn. Bd. of Ed., 788 F.Supp. 673 (D.Conn. 1992). The credible evidence at the hearing established that the IEP offered to the Student in June 2004 was reasonably calculated to provide educational benefits during the 2004-2005 school year. The draft IEP presented at the June 8, which was prepared by LDFDS, was based on the then current IEP for the 2003-2004 school year. The Student made progress on that IEP and would most likely have continued in that school if the relationship between the Parents and Ms. Fontaine had not deteriorated beyond repair. On June 22 the PPT revised the IEP to incorporate many of the changes requested by the Parents. Both versions of the June IEP were calculated to provide a meaningful educational benefit to the Student. The Board, therefore, satisfied the requirements of state and federal law in providing a FAPE to the Student.

7. The Board also has the burden of proving that the placement was appropriate. In this case the school-based members of the PPT rejected Woodhouse Academy as an appropriate placement for a number of reasons, including the fact that it was not an approved private school for special education and didn't have certified special education teachers and related services personnel. Section 1401 (9) of the IDEA, defines "free appropriate public education" in part as “special education and related services that-- . . . (B) meet the standards of the State educational agency.” The state regulation, Sec. 10-76d-17 regarding private facilities, provides in relevant part:

A board of education may place a child requiring special education and related services in a private facility.

(a) Requirements. Each board of education shall ensure that any placement in a private facility is made in accordance with the following requirements. . . .

(4) The private facility shall be approved as set forth in section 10-76d-17 (d) of these regulations. . . .

The Parents argue that this state regulation was overruled and rendered obsolete in the case of Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). That case held that placement at a school that is not state approved or does not meet the standards of the state does not itself bar public reimbursement. This case applies specifically to parental placement. In addition, the Court borrowing the reasoning from the Court of Appeals, stated in support of its holding that parents should not be forced to get the school system's approval when it is the school system that didn't provide the student with an appropriate program in the first place. That case, therefore, did not overrule the state regulation. There are other state laws governing placements in private schools. Where the Board places a student in a private school, state approval is required for the Board to obtain state funding. Conn. Gen. Stats., Sec. 10-76d(d). See also Regs. Conn. State Agencies, Sec. 10-76d-16(a)(2): ". . . Cooperative efforts between or among school districts shall be considered as taking priority over placement in a private or state-operated facility." Sec. 10-76d-16(3): "Placement in a private facility shall be made only when the board of education has fully explored all possible public placements."

9. The Parents also argue that the Board pre-determined placement at CES prior to the June 8 PPT meeting and, therefore, that its decision violated IDEA. With regard to the issue of a board making a final decision in advance of a PPT, the danger sought to be avoided is the parent's preclusion from meaningful participation in the decision making process as required by IDEA. Rowley, 458 U.S. supra at 205-06. In Doyle v. Arlington County Sch. Board, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) the Court clarifies the issue of “closed minded” board participation by distinguishing an open mind from a blank mind: “while a

school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.” In this case the Parents had a high level of participation in all aspects of the PPT process. They corresponded with Ms. Bud prior to the April and June PPTs, visited all of the possible placements for the Student prior to the PPTs and were participants in the decision that the Student was not ready to return to public school and required continued placement in a therapeutic day program. They were also active participants in revising the IEP at the June 22 PPT meeting. But for their dissatisfaction with LDFDS, a change of placement would not have been made. The Board cannot be faulted for preparing for the inevitable decision to change the Student's placement. It was clear from the testimony and exhibits that the Parents had determined even before the April PPT meeting not to accept any placement except Woodhouse Academy.

10. The Parents are free to place their child in a private school, but not at public expense. “Parents who unilaterally change their child’s educational placement without...the consent of school officials, do so at their own financial risk.” Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 373-74 (1985); Florence County Sch. Dist. Four v. Carter, supra. “[W]hether the parents of a disabled child are entitled to reimbursement for the costs of a private school turns on two distinct questions: first, whether the challenged IEP was adequate to provide the child with a free appropriate public education; and second, whether the private educational services obtained by the parents were appropriate to the child’s needs. ...Only if a court determines that a challenged IEP was inadequate should it proceed to the second question.” See also Walczak v. Florida Union Free Sch. Dist., supra at 134 (holding that where the IEP developed by the school district was appropriate, the school district could not be ordered to provide reimbursement to the parents).

11. Since the Board has provided FAPE to the Student, a ruling on the appropriateness of Woodhouse Academy as a placement is not necessary and no opinion is given on it. See Conn. State Regs. Sec. 10-76h-14. “Moreover, where a school system proposes an appropriate program, it has no duty to consider non-public programs. Hessler v. State Board of Education, 700 F.2d 134, 138 (4th Cir. 1983). Thus, the issue is *not* whether LSW is better, or even appropriate, but whether the school system is offered an appropriate program.” Doyle, supra at 1255.

FINAL DECISION AND ORDER

1. The Student was offered a FAPE in the LRE in the June 8 IEP, as modified on June 22, 2004, with the recommended placement at CES for the 2004-2005 school year.
2. There is no need to decide whether the Parents’ unilateral placement at Woodhouse Academy provided the Student with a FAPE.
3. The Parents are not entitled to reimbursement for the unilateral placement or transportation.

COMMENTS ON CONDUCT OF HEARING

The due process request was a lengthy 17 pages, and the hearing was a lengthy 11 days. The only real issue appeared to be the placement of the Student, specifically whether CES was an appropriate placement and, if not, whether Woodhouse Academy was appropriate. Both parties provided a full and extensive background and history of the Student’s disability and education. Neither party is faulted for unnecessarily prolonging the hearing. The due process request was unnecessarily lengthy and should have focused on the specific procedural claims sought to be raised.

The Parents' attorney’s motion to disqualify the Board's attorney because she attended three PPT meetings and was a necessary witness was not raised in the prehearing conference and was filed

on October 12, only one week prior to the first hearing date. This motion, which was lacking a legal foundation in that Atty. Laubin clearly was not a necessary witness, should not have been filed. This motion compounded the acrimonious relationship of the parties, which existed prior to the hearing.

Following the close of the hearing on January 6, both parties filed lengthy briefs, 100 pages for the Parents and 66 pages for the Board. Each side blamed the other for the protracted nature of the hearing. The Parents' brief raised a myriad of procedural violations of IDEA, which were not specifically raised in the request for hearing, opening statement or during the course of testimony. The Board moved to strike these issues from the Parents' brief. The Parents fired back with accusations against the Board. The parties were permitted to file reply briefs, which continued the heated debate. The Parents' reply brief included evidence, which was not part of the record. It also requested sanctions against the Board for unreasonably protracting the hearing and accused the Board's attorney of misconduct and malpractice. The Board's attorney wrote in protest asking to strike the offending matter and to sanction the Parents' attorney. The Parents' attorney responded with a voluntary request to strike those items in his brief. This Hearing Officer does not have the authority to order sanctions or award attorney's fees. Personal attacks on opposing counsel are unprofessional and have no place in due process hearings. Attaching new evidence to a reply brief is unprofessional conduct. Regs., Conn. State Agencies Section 10-76h-13. Since the offending portions of the brief cannot readily be separated, Parents' entire reply brief is stricken. In all matters in which Atty. Laubin has appeared before me she has acted in a professional manner.