

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Darien Board of Education

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Appearing Before: Attorney Justino Rosado, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Was the program and related services offered by the Board for the 2002-2003 appropriate and provide the student with FAPE according to 20 USC 1401 et seq?
2. Was the program and related services offered by the Board for the 2003-2004 appropriate and provide the student with FAPE according to 20 USC 1401 et seq?
3. Was the program and related services offered by the Board for the 2004-2005 appropriate and provide the student with FAPE according to 20 USC 1401 et seq?
4. Was the summer program offered by the Board for the summer of 2004 appropriate?
5. Did the Board properly evaluate the student?
6. Should the Board provide the student with a neuropsychological, speech and language and assistive technology evaluation at the Board's expense?
7. Did the Board provide the parents with their procedural safeguards during the 2002-2003, 2003-2004 and 2004-2005 school years?
8. Should the Board provide the student with compensatory education for the 2002-2003 and 2003-2004 school year?
9. Whether the parent has acted unreasonably in making the student unavailable for school and/or tutoring?
10. Does the statute of limitations apply to any of the parents' request?

PROCEDURAL HISTORY:

On or about June 13, 2004, the parents rejected the program offered to the student for the 2004-2005 school year. The parents also requested educational compensation for the 2002-2003, 2003-2004 school years and for the summer program for the 2004 summer. On or about September 14, 2004, a hearing officer was appointed. A pre-hearing conference was held on October 4, 2004 and agreed upon hearing dates of November 3, 5, 11 & 18, 2004 were scheduled. Additional hearing dates of January 4, February 22, April 4, 5, 21, 26, May 25, 26, June 23, July 25, 26, August 24 and October 3, 2005 were chosen by the parties. The parties mutually agreed to cancel the hearing dates of April 21 and May 26, 2005.

On or about October 27, 2004, the parents' advocate filed a motion for the hearing officer to recuse himself. The Board filed a timely objection to this motion and the parents advocate's motion was denied. The parents' advocate motion was based on the hearing officer's denial of her request that each hearing date be limited to 3 hours of testimony because of the advocate's medical condition. This would have greatly extended the hearing time, there was no bias or partiality of the hearing officer and the parents were not denied the ability to seek or retain representation. The parents also requested that the student be allowed to testify. The Board objected and requested that a guardian ad litem be appointed for the student. The Board's request for a guardian ad litem was denied and the student would be questioned by the hearing officer. The parties were requested to submit the questions for the student to the hearing officer and the parties would be able to obtain the responses. Before the student was to testify the parents' attorney withdrew the request for the student to testify.

The parents also had a claim that the student had been harassed in the Board's school and included in their request for due process a claim under §504 of The Rehabilitation Act of 1973. This claim was withdrawn by the parents' attorney on or about April 4, 2005.

The parents began the hearing with an advocate and on or about November 8, 2004; the parents informed the hearing officer that they were retaining an attorney to represent them. On or about June 23, 2005 the attorney representing the parents resigned and the Board filed a motion requesting that the hearing officer deny the parents' attorney request and order her to continue representing the parents. The parents also objected to their attorney resigning. IDEA's authority to a hearing officer is limited by statute and does not give the hearing officer powers to order an attorney to continue in their representation of a parent.¹ The parents' and the Board's request was denied and the attorney was allowed to resign. The parents on or about July 14, 2005 retained another attorney to represent them in the due process hearing.

There were various extension of the date of the final decision and order in order to accommodate the hearing dates, post trial briefs and the decision.

¹ Connecticut General Statute § 10-76h (d)(1) states, "The hearing officer or board shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education or the pupil if such pupil is an emancipated minor or eighteen years of age or older, has placed the child or pupil in a program other than that prescribed by the planning and placement team, or to prescribe alternate special educational programs for the child or pupil."

The date for the Final Order and Decision was extended by agreement of the parties to January 30, 2006.

SUMMARY:

The student is a 15 years and 3 month young woman who has been identified with speech and language impairment and is entitled to receive a free and appropriate public education ("FAPE") as defined in Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. The student had been unilaterally placed at Hope Academy for her 5th grade. The parents returned the student for her 6th grade in the Board's school. In the middle of her 6th grade, the student suffered anxiety attacks and suffered from depression. The parents unilaterally removed the student from the Board's school and the student received homebound instruction.

Approximately one year after being removed from school, the parents placed the student in Villa Maria Educational Center. The Board refused to fund this unilateral placement. The programs offered by the Board for the 2002-2003, 2003-2004, summer 2004 and 2004-2005 school years were appropriate.

The findings of fact 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. 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)

FINDINGS OF FACTS:

1. The student is a 15 years and 3 month young woman who has been identified with speech and language impairment and is entitled to receive a free and appropriate public education ("FAPE") as defined in Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. (Testimony of Father, Board's Exhibit² # 3)
2. In 1994, the student was evaluated by a psychologist and found to be language delayed. The parents exercised their right and asked that the student repeat kindergarten. The Board complied with the parents' request. (Testimony of Father)
3. The student had attended the Board's school where her program included individual and small group instruction. The parents also provide the student with private tutoring outside of school. In the summer of 2001 the parents' concern for the student escalated, they enrolled the student in a summer Lindamood Bell program. The parents were of the opinion that the Board was not providing the student with a proper program and unilaterally placed the student in Hope Academy for the 2001-2002 school year. Hope Academy did not provide the student with any occupational therapy or speech

² Hereafter "B" will be used to represent a Board Exhibit followed by the number of the exhibit.

therapy. The student complained that the teachers at Hope Academy were mean and that she was experiencing medical maladies and anxieties. The parents decided to return the student to the Board's School. (B-1, Testimony of Father, B-4, B-148)

4. The parents did not attend the student's 2002-2003 transitional IEP from Hope Academy to the Board's school. The day of the IEP the parents sent a letter to the school stating that they would not be attending the IEP and that the IEP meeting should be cancelled. (B-1)

5. The Board did not cancel the June 13, 2002 IEP meeting. The Board utilized the January 2002 psychological evaluation, records from Hope Academy, testing from Lindamood Bell, a 2001 audiological evaluation of the student and a May 2000 psycho-educational evaluation of the student to plan her 2002-2003 program. (B-3)

6. The parents disagreed with the IEP offered to the student for the 2002-2003 school year. The parents retained an attorney. The matter was mediated by the parents and the student attended the Board's school for the 2002-2003 school year. An agreed upon educational consultant was provided for the student. In developing the IEP for 2002-2003 school year, the PPT reviewed and considered an independent psychological evaluation by a psychologist from the Yale University Child Study Center. The psychologist reported the student's intellectual skills ranged from borderline to below average. The psychologist recommended that the student's instruction should be in a combination of individualized and small group instruction and that the student continued to need related services of speech and language therapy and occupational therapy. The psychologist recommendations were considered and incorporated in the student's IEP. (B-1, B-12, B-16, Parents' Exhibit³ # 10)

7. The parents did not accept that the student's intellectual skills ranged from borderline to below average. They attributed the student's problems to central auditory processing and fine motor skills. (P-14)

8. On November 15, 2002, the 2002-2003 IEP was revised. The parents' attorney attended the IEP meeting. A new auditory evaluation⁴ was agreed upon by the parties. The parents requested that the student's social studies class be in the mainstream. This was agreed to by the PPT and the student's IEP reflected a reduction in her self-contained classroom of 1 ½ hours and increased time in mainstream class. (B-20, B-21, Testimony of Father and Director of Special Education)

9. During the 2002-2003 school year, the student adapted to her environment and worked well with other students. The student participated in oral presentations and assisted in writing a book which was published. The student benefited from her

³ Hereafter "P" will be used to represent a Parent Exhibit followed by the number of the exhibit.

⁴ On November 16, 2002, an auditory evaluation of the student revealed a significant auditory processing disorder. The evaluator recommended interventions. The student was offered an FM system, which when shown, the student refused to use because she did not want to be different than her peers. (B-25, Testimony of Special Education Director)

mainstream social studies class. She worked with her peers on presentations and the group received an award for their work. The student benefited from class discussions and felt that she was part of the class. When the student was called upon, she knew the answer. The student's progress was conveyed to the father both orally and by e-mail. At the March 2003 IEP, the parents were accompanied by an advocate. The parents did not object to the IEP. The parents did not request that the student be placed in another placement other than the Board's middle school. (Testimony of Regular Education Teacher, B-25, B-3)

10. The parents were concerned about the student's homework assignments and requested step-by-step instructions for the student's homework. The parents were told that the student would have an aide to review the student's homework assignments. The PPT offered the aide if it was necessary. (Testimony of Father, B-25, B-65)

11. On or about February 10, 2003 the parents wrote to the Board stating that they had not agreed to the IEP of November 15, 2002 and that they were not allowed to participate in the creation of the IEP. (P-12)

12. The parents and the educational consultant retained by the Board had a disagreement. The consultant in a letter to the Board resigned her position. (B-27, B-28)

13. In spring of 2003, the parents independently retained an education consultant to assist the student IEP team in creating a program. The parents were unhappy with the student's inclusion part of her IEP. The consultant observed the student in the school. At the June 17, 2003 IEP meeting there was an agreement of the parties on the student's IEP goals. At this IEP, the parents were assisted by the educational consultant. (Testimony of Father, Testimony of Consultant Ms. Schneider, B-29)

14. During the 2002-2003 school year the student's final grades were 2 A's, 2 A-, 1 B+, 3 B's and 1 B-. The student made social gains and had good interaction with her peers. (B-30, Testimony of School Psychologist, Testimony of Special Education Director)

15. The IEP for the 2003-2004 school year provided the student with 14 hours per week of special education, Academic Learning Center⁵ mathematics, 2 hours each week of speech & language, .7 hours each week of occupational therapy, .5 hours each week of counseling, and 6.3 hours each week in a mainstream setting with non-disabled peers. The parents requested that the student be enrolled in mainstream classes for her core academics, despite the fact that such enrollment was contrary to the recommendations of the Yale psychologist who had evaluated the student, and despite the fact that the PPT recommended that core subjects be in the ALC. The PPT complied with the parents' request. The parents requested that the student be placed in a particular teacher's class team and the PPT complied. (B-29, Testimony of Consultant Ms. Schneider, Testimony of Director of Special Education, Testimony of Regular Education Teacher).

⁵ Academic Learning Center (ALC) is small classes with individualized support structured to minimize transitions and provide for continuity of contact.

16. The new educational consultant felt that at the end of the PPT meeting her recommendations were heard and there was agreement at this IEP. Many of the recommendations were incorporated in the IEP. The consultant stated that the parents, during her tenure as the student's educational consultant, did not state that the student was unhappy in the Board's school. In creating the 2003-2004 IEP the team reviewed the student's June 12, 2003 educational evaluation, reviewed the student's triennial occupational therapy evaluation and her speech and language evaluation. (Testimony of Consultant Ms. Schneider, B-29)

17. The parents were pleased and happy with the June 17, 2003 IEP. They felt it was a "common sense" approach to provide the student with an appropriate education program. (P-15)

18. In the first 2 weeks of the 2003-2004 school year, the father called the school various times reiterating what was stated in the IEP and requesting different materials. The student's teachers responded to the father's inquiries and the school responded outlining the methods of communication between the parents and the school. The parents received the materials requested but not all the textbooks.(B-32, B-33, P-14, P-15)

19. The school principal established a communication system in order to keep the parents informed of the student's progress and allow the parents to present their concerns. The parents would have monthly meetings with case managers, team leaders and school counselor. The case manager would provide the parents with weekly updates; the special education teacher would provide a form showing the unit of study being utilized by the student's teachers. The special education teacher would contact the parents once a week by phone. (B-33, B-176, B-178, Testimony of Speech and Language Pathologist)

20. On or about the 2nd week of the 2003-2004 school year, the parents sent by electronic mail a letter to the State Department of Education (SDE) stating that the student's IEP was not being implemented in its entirety and their intent to seek due process if necessary. They were advised that they had the option of filing a complaint or contacting the Board. They were also advised that parts of an IEP were time sensitive and the IEP should be implemented at the beginning of the school year. The parents received a quick response from the Board and a meeting was scheduled for September 18, 2003, to clarify the misunderstandings. (P-17, Testimony of Father, P-19)

21. During the 2003-2004 school year, the student's teachers tracked her progress in her goals and objectives. These charts and reports were provided to the parents. The reports showed instructional strategies and specific modifications in the student's program. (B-178)

22. At the December 4 & 22, 2003 PPT's, the PPT reviewed an assistive technology evaluation and the student's goals and objectives. The parents were accompanied by an advocate. The Board provided the student with supplementary visuals, modified worksheets, manipulatives, computer access, extra time on tests and projects, study guides, oral testing, color coded folders, highlighted copies of notes and visual

reinforcement, among other modifications and adaptations as required in her IEP. The parents were provided with strategies and modifications for each class so parents knew what the student was working on. (B-61; B-174; B-175, Testimony of Director of Special Education).

23. During the 2003-2004 school year the student received 2.1 hours of speech and language therapy. The student was an active participant in the sessions and made progress in her short term objectives and goals. The speech and language pathologist collaborated with the student's other teachers with weekly meetings. The pathologist had monthly meetings with the parents in order to share the student's progress and to advise the parents what they could do with the student at home. She also provided the parents with progress reports showing how the student was doing in therapy and in the classroom. The student sat in the front row of her class and had a good relationship with her peers. The student was also demonstrating improvement in her speech and language therapy. She had also improved her ability to retain words in memory and to recognize new words in her academic classes. During the October 2003 to December 2003 school period, the parents did not raise any issues with her about the student's emotional state. (Testimony of Speech and Language Pathologist, B-68, B-174, B-178)

24. The father testified that the student was having anxiety problems in December and was having problems sleeping and not able to work alone. At the team meeting in January 2004, he told the team that the student was feeling sick and sad. There was an episode on January 27, 2004, where the student was upset because there was a change in her schedule. This issue was resolved in the school by the guidance counselor and the student returned to her class. On February 2, 2004, the Board received a request from the parents for a psychological evaluation of the student. (Testimony of Father, B-69, B-73)

25. The parents were active participants in their child's IEP. They freely expressed their concerns over the student's program. They were well represented by either an attorney, advocate and/or educational consultant at the PPT. (B-3, B-20, B-25, B-29, B-61, B-66, B75, B-93)

26. On February 2, 2004, the student attended a field trip with her class. The student sat with students she was not familiar with. When the group returned to school, the student became upset and began to cry. The student expressed that she had no friends. The school called the parents and the student went home. This was the last day the student attended the Board's school. The parents did not provide the Board with a doctor's note or evaluation to remove the student from school. The parents would not return the student to school until she was fully evaluated. (Testimony of Director of Special Education, B-73, B-76)

27. On or about February 3, 2004, the student was seen by her pediatrician. The doctor found the student suffering from anxiety and depression and recommended that the school psychologist evaluate the student in order to see what academic and social modifications might be available to the student to address her appropriate educational placement. (B-69)

28. The Board attempted to have the student meet with the school psychologist either at her home or in school. The parents declined the offer in order to have the student meet with a private psychologist. (B-71, B-72, Testimony of School psychologist)

29. On February 23, 2004, a PPT was held to discuss the student's concerns, plan necessary evaluations and prepare a transition plan to return the student to school. The PPT recommended psychological testing and a transition plan. The PPT offered a modified IEP with a shortened day with 3.5 hours each week of small group instruction in a resource room or self-contained classroom, 1.25 hours of weekly counseling and 1.25 hours each week of speech and language. The parents rejected the IEP because they felt that the student was not ready to return to school. At the PPT, the parents' advocate recommended homebound instruction if the student's psychologist agreed. The Board did not agree with this recommendation because they felt the student needed interaction with her peers. (B-75, Testimony of Father, Testimony of Director of Special Education)

30. The Board agreed to provide the student with homebound instruction in March 2004. In her second session of homebound instruction, the student had a relapse of her anxiety. The student was evaluated by a private psychologist who agreed that the student required special education instruction in a small group and a mainstream setting was not appropriate for the student. The student's psychiatrist recommended that the student return to the Board's school in the 2004-2005 school year. (B-90, B-92, P-39, Testimony of Steven M. Sichel, Ph.D.)

31. During 2004, the student had various sessions with her psychologist. The student expressed that she was harassed. The student showed elevated signs of suicide but was not suicidal. Tests performed on the student showed elevated scores for depression. The student showed signs of post traumatic stress syndrome but does not have a diagnosis of post traumatic stress syndrome. (Testimony of Steven M. Sichel, PH.D., B-92)

32. The doctor observed the student's current placement, Villa Maria, but the student was not present. He never observed the student in a Board school environment or interviewed any of her school district teachers. (Testimony of Steven M. Sichel, PH.D.)

33. The psychologist saw the student in the spring and summer of 2005 and the student seemed happy and well adjusted. The student showed no signs of anxiety or depression. The psychologist was not aware that other psychologists and doctors had recommended that the student should return to school. His opinion was that returning the student to the Board's school would be detrimental. (Testimony of Steven M. Sichel, Ph.D., B-92)

34. At the April 8, 2004 PPT, the Board proposed a shorten day for the student. The parents were not in agreement with this plan and asked to have the student's psychologist review the plan. The PPT reviewed the student's latest educational evaluation and letters from her psychologist and medical doctor. The student's medical doctor, who was present at the PPT, agreed with the plan and was of the opinion that it should be accepted. The

parents rejected the IEP⁶ until it was reviewed by the student's psychologist. The parents requested a speech and language evaluation of the student. (B-93)

35. The parents did not review the April 8, 2004 IEP with the student's psychologist as stated at the PPT meeting. (Testimony of Steven M. Sichel, PH.D.)

36. The student received an extensive speech and language evaluation on June 9, 2004. The student showed deficits in her auditory perception and exhibited difficulty in learning and retaining rote material. The pathologist recommended social skills interventions in her daily life skills, speech and language interventions, environmental interventions to enhance auditory processing, assistive technology and counseling to address behavior problems. (B-114 Testimony of Speech and Language Pathologist)

37. During the 2003-2004 school year the student made progress in her IEP goals and objectives. Before being removed from the Board's school by her father, the student had made progress in 11 of the 13 goals in her IEP. The student's regular education teacher commented that the student had made progress as to her IEP goals. The student's monthly progress reports showed progress in her academic classes. The student's grades prior to her withdrawal from school were 3 A-, 2 B+, 1 B, 2 B- and 1 passing grade. The student was starting to make more social emotional development by becoming self aware. ((B-66, B-67, B-122, Testimony of School Psychologist).

38. At the June 15, 2004 PPT, the team revised the April 8, 2004 IEP and reviewed the speech and language evaluation and the homebound tutor reviewed the improvements the student had been doing in therapy. Extended school year was offered to the student with speech and language therapy and 6 hours of special education with concentration on math and English with writing skills. The parents requested an independent psychiatric evaluation and an independent educational evaluation. The PPT agreed to the parents' request. The PPT recommended another transition plan for the student's return to the Board's 8th grade. The Board recommended tutoring times in the morning for the student. The parents rejected this schedule. The Board, with parental permission, contacted the student's doctor to see if an appropriate tutoring session for the student could be created. The doctor agrees with the Board's recommended tutoring schedule. (B-115, B-128, B-131, B137)

39. The IEP written at the June 15, 2004 PPT for the 2004-2005 school year consisted of 16.8 hours each week of special education in a resource room or self-contained classroom, 2.8 hours each week of speech and language, .7 hours each week of occupational therapy, 1.67 hours each week of counseling and 10.53 hours each week of mainstreaming with non-disabled peers. The parents rejected the IEP that was offered to the student. (B-115, B-146, Testimony of Director of Special Education)

⁶ The parents also requested profiles of the students in the ALC Program that the student would be attending. This was denied to the parents. The parents were told that the program is not a behavioral program but for students with speech and language difficulties or below average. (B-93)

40. The parents selected Dr. Susan Steneck to perform the independent educational evaluation. The psychologist found that the student's academic skills were below expectation. The student required intensive speech and language and counseling on a regular basis. Some of the student's mathematic deficits can be attributed to her language deficits. The student had a language based disability that impacted her mathematics, written language, reading comprehension and auditory comprehension skills. The psychologist did not recommend that the student be placed in a more restrictive placement. She recommended that a mainstream setting was not appropriate for the student and that she required a small class room setting in a more protective environment. (B-130; B-144).

41. The parents selected Dr. Karen Brody to perform the independent psychiatric evaluation. Dr. Brody recommended that the student continue on her program of homebound tutoring and work towards returning to the Board's school in order to overcome her fears and to participate in the social aspects of her education with her peers. Dr. Brody noted that the student had been evaluated 16 times in three years and that the recommendations of the various evaluators were consistent. Dr. Brody stated that it would be important for the student to return to the Board's school. The doctor diagnosed the student with an adjustment disorder with anxiety. (B-130(B-148 B-152)). (Id.).

42. Dr. Brody was of the opinion that the student's anxiety was related to her experience at the Board's school. In order to deal with this anxiety it would be necessary for the student to return to the school and face the situation with support. This would assist the student and increase her self-esteem and mastering her fears is important for the student's mental health. The doctor felt that the student was someone who tried to please her parents and repeated what the parents say. The student's transition to the Board's school should happen before the end of her eighth grade. This would assist her socially because she would be transitioning to high school with her peers. The student was able to attend the Board's high school during a summer program without difficulty. The doctor thought it would be appropriate for the father to go to school with the student as part of the transition. The doctor also opined that the parents should obtain guidance in dealing with an adolescent child with the complex developmental delays as the student. (Testimony of Karen Brody, MD., B-148)

43. At the October 26, 2004 PPT, the student's IEP for 2004-2005 was revised and a transition back to the Board's school was created. The IEP consisted of two separate educational programs, "transition" and "back at school". The transition program ran from November 11, 2004 to January 15, 2005. The transition plan for the school week consisted of 7 hours of homebound instruction in core academic areas, 2.1 hours of homebound speech and language therapy, .7 hours of homebound counseling, and .7 hours of homebound occupational therapy. On November 26, 2004, counseling would increase to 2.5 hours each week at the Board's school to prepare for return to the school. The program upon her return to the Board's school on January 16, 2005 would consist of 7.5 hours each week of special education in a self-contained classroom, 1 hour each week of lunch bunch, 2.1 hours each week of speech and language, 2.5 hours each week of counseling, .7 hours each week of occupational therapy, and 10.53 hours each week with

non-disabled peers. The parents rejected both the transition and “back at school” IEP and requested placement at Lindamood Bell.⁷ The PPT denied the parents’ request. (B-199; Testimony of Father).

44. In November 2004, the parents contacted Villa Maria Education Center (VMEC), in Stamford, Connecticut, seeking placement for the student. The parents decided to keep the student out of school from February 2, 2004 until January 5, 2005 when she was placed at VMEC. The student was placed at VMEC on a provisional basis in a 6th grade class even though she is an 8th grade student. At VMEC the student was not receiving any counseling or occupational therapy. They are not offered at the school. The student is receiving these services from private providers. (Testimony of Parent)

45. VMEC is a private school for children with learning disabilities, from kindergarten to 8th grade. On the average the class ratio is 4 students to one teacher. The school had concerns about admitting the student because she had intellectual skills from below to borderline and generally that was below their acceptable levels. The student’s acceptance into VMEC was because of father’s persistence. The student is doing well in school and participates in class. VMEC did not contact the Board to seek the student’s records or speak to the tutors who were home tutoring the student. VMEC does not modify the class work to fit the individual student. The student progresses in a group that functions at the same level. The student is 2-3 years older than her group. (Testimony of Admissions Director of VMEC)

46. On April 19, 2005, the PPT planned the student’s transition for the remainder of the 2004-2005 school year, the summer program for 2005 and the 2005-2006 school year. The team was composed of the PPT team from the student’s middle school and personnel from the high school. The student’s progress reports were reviewed by the PPT. The student was reading at a 2nd grade level and at VMEC all academic courses were at an introductory level. The assistive technology evaluation was reviewed and an Alpha Smart 3000, auditory processing software and spell check devices were to be used in the student’s program. The IEP consisted of: 15.4 hours of small group instruction in the EXCEL⁸ program, 1.5 hours each week of counseling, 2.25 hours each week of speech and language therapy, .7 hours each week of occupational therapy, and 11.5 hours each week with non-disabled peers. The PPT recommended additional supports such as monthly team meetings with the parents. The parents did not object to the goals and objectives presented at the PPT and did not present any evaluation or report stating that the student required residential placement. (B-221, Testimony of Director of Special Education)

CONCLUSIONS OF LAW:

⁷ Lindamood Bell is a tutorial program not a school. (Testimony of Director of Special Education)

⁸ EXCEL is the high school counterpart of the ALC. (Testimony of Director of Special Education)

1. The parties agree that the student who has been identified as having a speech and language disability is entitled to FAPE with special education and related services as defined in the provisions of Connecticut General Statute §10-76a et seq. and the IDEA 20 U.S.C. 1401 et seq.

2. In *Rowley*⁹, the Supreme Court explained that review of a placement decision under IDEA requires a two-step inquiry: first, it must be determined whether there has been compliance with the Act's procedural requirements; second, it must be determined whether the IEP is "reasonably calculated to enable the child to receive educational benefits."¹⁰

3. "The initial procedural inquiry is no mere formality."¹¹ "[A] dequate compliance with the procedures prescribed [by IDEA] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."¹² The parents allege that they did not take an active role in the creation of the student's IEP, did not receive their procedural safeguards and the IEP was not written in compliance with procedures. An IEP includes a statement of the child's present levels of educational performance; the annual goals for the child, including short-term instructional objectives; the specific educational services to be provided to the child; an explanation of the extent to which the child will not participate with non-disabled children in regular educational programs; any transition services the child needs as he or she begins to leave a school setting; and the projected initiation date and duration of proposed services. 20 U.S.C. § 1414(d)(1)(A).

2002-2003 school Year:

4. A review of the IEP for the 2002-2003 school year clearly shows parent participation and compliance with procedures. A finding of a procedural violation in and of itself does not render an IEP legally defective. Rather, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."¹³ The parents chose not to attend the PPT on June 13, 2002. The Board clearly utilized the information provided from the student's prior placement and evaluations, inputs from professional educators and created an IEP that satisfies the first prong of *Rowley*. At a later PPT, with further input from the parents and their attorney the Board revised the PPT and allowed the student to increase her integration into the mainstream setting.¹⁴ Clearly there were no procedural violations that would have impeded the student from receiving FAPE. The PPT team did not compromise the student's rights to an appropriate education.

⁹ *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982),

¹⁰ *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3051

¹¹ *M.S. ex rel. S.S. v. Board of Educ. of Yonkers*, 231 F.3d 96, 102 (2d Cir. 2000).

¹² *Rowley*, 458 U.S. at 206.

¹³ *Roland M. v. Concord Sch. Comm.*, 910 F. 2d 983, 994 (1st Cir. 1990), *cert. denied*, 449 U.S. 912 (1991)

¹⁴ Findings of Facts #5, #6, #8

5. Second, *Rowley* requires that the individualized program must be reasonably calculated to enable the child to receive educational benefit. This test has been subsequently clarified to hold that FAPE requires that the individualized education program offered to a child must provide more than a trivial education benefit.¹⁵

6. The local educational agency has the burden of proving whether an appropriate program has been offered by a preponderance of the evidence.¹⁶

7. It is clear that the Student has received more than a trivial educational benefit from the educational program provided by the school district. The student not only received passing grades, but testimony clearly showed that the student was an active participant in her class and made social gains. The student's counselor created a "lunch bunch" to assist the student in interacting and socializing with her peers. (B-25) The student's progress was clearly conveyed to the father.¹⁷ In creating the IEP there was no objection by the parents who were clearly represented by an attorney or educational consultant during this school year.¹⁸ The program offered by the Board for the 2002-2003 school year was appropriate.

2003-2004 School Year

8. A review of the IEP's¹⁹ for the 2003-2004 school year clearly shows parents' participation,²⁰ providing the parents with their procedural safeguards and the Board's compliance with IEP procedures. The Board reviewed the student's current evaluation, received input from the student's teachers and providers and incorporated recommendations from the consultant retained by the parents.²¹ The Board complied with the first prong of *Rowley* in creating the 2003-2004 IEP.

9. While the IEP does not have to maximize the child's educational potential, it must provide "meaningful" opportunities and the possibility for more than "trivial advancement."²² The student has made progress on many of her goals and objectives²³ and was making progress in her academic classes and her academic grades ranged from A- to B-. The Board clearly showed that the IEP provided meaningful opportunities for the student to receive FAPE. Once the student started demonstrating anxiety and depression, the parents unilaterally decided to remove the student from school. The Board offered the student a revised IEP with a transition plan which the parents refused. The Board offered to have the student evaluated by the school psychologist in order to

¹⁵ See *Polk v. Central Susquehanna Intermediate School Unit 16*, 853 F.2d 171 (3rd Cir. 1966) *cert denied*, 488 U.S. 1030 (1989)

¹⁶ Regulations of Connecticut Agencies § 10-76h-14

¹⁷ Findings of Facts # 9 & 14.

¹⁸ Findings of Facts # 9.

¹⁹ The Board conducted 5 PPT meetings which include 2 transition plans during the 2003-2004 school year. Findings of Facts #15, #22, #29, & #32.

²⁰ Findings of Facts #16 & #25

²¹ Findings of Facts #15, #16, #22, #34

²² *Walczak v. Florida Union Free School Dist.*, 142F.3d 119, 130 (2d Cir. 1998)

²³ Findings of Facts # 37

facilitate her return to school and the parents refused. The Board offered to have the student return for 1 hour each day which was also refused by the parents. After initially refusing to provide the parents' request for homebound instruction, the Board provided the student with tutoring in her core courses and speech and language therapy. Progress reports of the tutoring sessions were provided to her parents.²⁴ The Board continued to evaluate the student in order to provide the student with a program that would continue to provide meaningful benefit to the student in her fragile state, but the parents were not willing to allow the student to return to the Board's school. The program offered the student for the 2003-2004 school year was appropriate.

ESY 2004 and 2004-2005 SCHOOL YEAR

10. A review of the June 2004, IEP for the summer 2004 and the 2004-2005 school year clearly shows parent participation and compliance with procedures.²⁵ The IEP for the summer of 2004 was written to provide the student with a program that would avoid regression and provide the student with more than a trivial educational program. It was an appropriate extended school year program.

11. IDEA requires that, "[A]t the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction."²⁶ Utilizing the second prong of the *Rowley* test, a review of the IEP for the 2004-2005 school year shows that the Board's IEP is an individually based assessment of the student. The Board considered the input of educational professionals knowledgeable about the student's performance and at the June 15, 2004 PPT accepted the parents' request for additional educational and psychiatric testing of the student. The results of these additional evaluations were reviewed at a follow-up PPT. At that, October 26, 2004 PPT, the psychiatrist that the parents selected was present and recommended a transition of the student to the Board's school. The Board has made many attempts to satisfy the parents' fears about the student's return to school. Different programs have been created with a gradual return of the student to the Board's school²⁷ and rejected by the parents. The IEP offered the student for the 2004-2005 school year would have enabled the student to receive more than a minimal education and would have provided the student with FAPE.

12. Meeting the *Rowley* test, however, is not, in and of itself, dispositive of whether FAPE has been offered. The IDEA also requires that children with disabilities be educated in the least restrictive environment. Specifically, *Rowley* recognizes that "despite [the IDEA's] preference for 'mainstreaming' handicapped children ... Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act [thus] expressly acknowledges that 'the

²⁴ B-101, B-113

²⁵ Findings of Facts # 37 & #38

²⁶ 34 C.F.R. §300.342

²⁷ Findings of Facts # 34, #38, #39, #43 & #46.

nature or severity of the handicap may be such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."²⁸ In January 2005, the parents unilaterally placed the student at VMEC, a placement the Board rejected. Although there is no question that *Rowley* demarcates an outer limit to the IDEA's LRE preference, *Rowley* does not provide guidance for determining whether, in a specific case, the IDEA's LRE requirement has been met. The court set forth several non-exclusive factors to assist "in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services"²⁹ These non-exclusive factors include: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class." *Id.* at 1218. In this case, each factor individually, and all of the factors collectively, weigh in support of the program offered by the Board with the supportive services and supplemental aides

13. The Board clearly considered the student's inclusion in the mainstream setting. When the parents requested more inclusion for the 2003-2004 school year, the Board agreed. All the PPTs' considered inclusion of the student with non-disabled peers and where inclusion in the mainstream was not possible reasonable efforts to accommodate the child in a regular classroom were made. The student's program was made to ensure that it would provide her with educational benefits to the maximum extent possible with non-disabled peers. The student's inclusion with non-disabled peers was not an adverse impact for other students. The parents' request for a more restrictive placement at VMEC would not provide FAPE in the LRE for the student.

14. The Board's Program for the 2002-2003, 2003-2004, and 2004-2005 school years does provide the student with FAPE in the least restrictive environment.

15. The parents request for due process was dated September 15, 2004, but a letter dated July 11, 2004 shows that the parents were not in agreement with the IEP offered the student on June 13, 2004. Any request for due process and compensatory education for the student's program in this hearing will be limited to any violations of the student's educational placement on or after June 13, 2002.³⁰

²⁸ *Rowley*, 458 U.S. at 181 n.4, 102 S.Ct. 3034, *citing* 20 U.S.C. § 1412(5)

²⁹ *Oberti Board of Ed. of the Borough of Clementon School District*, 995 F. 2d, 1036, 1048 (5th Cir. 1989)

³⁰ Connecticut General Statutes § 10-76(h)(3) This provision establishes a two-year limitations period for challenges to an educational placement. It states that the limitations period generally begins at the time the school board declines to make the educational change desired by the parents or at the time it proposes an educational change that the parents deem unsuitable.

FINAL DECISION AND ORDER:

1. The program and related services offered by the Board for the 2002-2003 are appropriate and provide the student with FAPE.
2. The program and related services offered by the Board for the 2003-2004 are appropriate and provide the student with FAPE.
3. The program and related services offered by the Board for the 2004-2005 are appropriate and provide the student with FAPE.
4. The summer program offered by the Board for the summer of 2004 was appropriate.
5. The evaluations performed by the Board were appropriate.
6. The Board does not need to provide the student with a neuropsychological, speech and language and assistive technology evaluation as requested by the parents.
7. The Board provided the parents with their procedural safeguards during the 2002-2003, 2003-2004 and 2004-2005 school years.
8. The Board does not have to provide the student with compensatory education for the 2002-2003 and 2003-2004 school years.
9. The parent did not act reasonably in making the student unavailable for school and/or tutoring.
10. The statute of limitations does not apply to any of the parents' requests.
11. The Board shall have a PPT meeting within 2 weeks after the issuance of this order in order to create a new transition plan for the student. The Board shall invite Dr. Karen Brody to assist in this transitional IEP. If Dr. Brody is of the opinion that update to the evaluations utilized in the April 19, 2005 PPT are necessary to assist the PPT team, the evaluations shall be done at the Board's expense.