

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

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Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

PARENTS' ISSUES:

1. Whether the Board's program for the Student for the 2004-2005 school year was appropriate.
2. Whether the Board's proposed program for the Student for the 2005-2006 school year was appropriate.
3. Whether during the 2004-2005 school year the Board placed the Student in regular classes and removed him from that environment only when he could not be educated satisfactorily in regular classes with supplementary aids and supports and modifications to the general curriculum as required by 20 U.S.C. §1412(a)(5)(A).
4. Whether during the 2005-2006 school year the Board considered placing the Student in regular classes and removing him only from that environment when he cannot be educated satisfactorily in regular classes with supplementary aids and services and modifications to the curriculum as required by §1412(a)(5)(A). [Exhibits H.O.-1, H.O. -3]

BOARD'S ISSUES:

Whether the hearing officer shall override the Parents' refusal to consent to a psychiatric evaluation, consultation/observation by a teacher of the hearing

impaired and a mutually agreeable consultant who has experience and expertise as a behavioral specialist. [Exhibit H.O.-4]¹

SUMMARY:

The nine year old Student with Down's syndrome was included in regular education approximately 60 percent of the time in the 2004-2005 school year, and proposed to be included in regular education 73 percent of the time in the 2005-2006 school year. The Parents requested this hearing to challenge the appropriateness of the Student's program, and determine whether the Student was removed from regular education only when he could not be educated satisfactorily with supplementary aids, supports and modifications to the general curriculum. The Board sought to override the Parents lack of consent for a psychiatric evaluation of the Student.

PROCEDURAL HISTORY:

The Parent requested this hearing on June 9, 2005. The mailing date of the decision was extended at the request of the attorneys for the parties, and without objection from the opposing party to schedule additional hearing dates as necessary to present their case. The hearing convened on fourteen dates, from June through September 2005. At the conclusion of the hearing, the attorneys for the parties requested additional extensions to allow for the submission of briefs and reply briefs.

The attorneys for both parties filed briefs on October 21, and reply briefs on November 4.

The Parents' witnesses were the Mother; Dr. Kathleen Whitbread, inclusion consultant; and Nancy Wilcock, Board special education teacher.

The Board's witnesses were Maxanne Kass, Board speech and language pathologist; Holley Mazur, Board regular education teacher; Joyce Schwalenberg, Board physical therapist; Karen Daigle, Board occupational therapist; Greg Smith, Board consulting behavior analyst; Nancy Wilcock, Board special education teacher; Dr. Robert Riccio, psychologist; and Martha Hartranft, Board director of special education.

A substantial number of exhibits were submitted by both parties. The Parents submitted 108 exhibits; the Board submitted 94 exhibits. Each exhibit submitted was reviewed and afforded its due consideration.

During the hearing, the parties were ordered to convene a planning and placement team [PPT] meeting to review the assistive technology evaluation and the behavior consultation report, and attempt to select a mutually acceptable behavioral consultant.

¹ The Board subsequently withdrew issues with the agreement of the Parents' attorney. The sole Board issue that remained in the hearing was whether the Student shall undergo a psychiatric evaluation in the absence of parental consent.

Subsequent to the hearing officer ordered PPT, the Board and Parents agreed that all of the Board's issues, except for the request for a psychiatric evaluation, could be withdrawn without prejudice, and this request to withdraw the issues was granted.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

FINDINGS OF FACT:

1. The Student is 9 years old, and has Down Syndrome, an intellectual disability and a mild hearing impairment. [Testimony Mother]
2. The Student's medical history is remarkable. He was born with a blockage in his small intestine for which he had surgery when he was 11 days old. He also was born with a large hole in his heart, for which he had surgery when he was 12 weeks old. He has had various additional illnesses and surgeries during his life. He has Hirschsprung's Disease, for which he had surgery again on his bowel in 2004. As a result of the Student's disabilities and multiple surgeries, the Student is not toilet trained. [Testimony Mother]
3. The Student's communication skills are limited. The Student uses signs, gestures and some words to communicate. The Parent is concerned that a fairly significant amount of the Student's behavioral problems are due to his inability to communicate effectively. [Testimony Mother]
4. The Student received services from the Connecticut Birth to Three Program as he exhibited significant developmental delays. Since the time the Student became three years old, the Board has been responsible for providing the Student a free appropriate public education. From 2000 to the present, the Student has attended the Board's Anna Reynolds elementary school. Beginning in the integrated preschool program, the Student then attended kindergarten to the current third grade in the same building. [Testimony Mother]
5. The Student has been and is fatigued at school sometimes when he does not have a full night's rest or when he is fighting a cold. [Testimony Mother] Whenever fatigue was an issue at school, the paraprofessionals would note it in the home-school communication book. [Testimony Ms. Mazur]
6. The Student has exhibited behavioral issues that have figured prominently while the Student has been at the Board schools. These behaviors have included playing with feces, and hitting, grabbing, pulling hair, attempting to bite and kicking peers and adults. He also fails to respond to directions from staff. [Testimony Mother, Ms. Wilcock, Ms. Mazur, Ms. Kass, Mr. Smith; Exhibits B-80, B-81]

7. During the 2003-2004 school year, the Student had problems with substitute paraprofessionals. The substitutes seemed to be a trigger with the Student, resulting in behavioral incidents. [Testimony Mother] This problem of unfamiliar staff had not been addressed appropriately by the team, and was never addressed in a behavioral plan.
8. Greg Smith served as the Board's behavior consultant for the Student for three years. Mr. Smith has a B.A. in psychology and human relations, and a master's degree. He is not a certified or licensed psychologist, but has received a national certification as a behavior analyst. [Testimony Mr. Smith] Over the course of the time that Mr. Smith consulted with the Student, he drafted various reactive behavioral intervention plans. [Testimony Ms. Smith; Exhibit B-82] These plans were not developed after appropriate functional behavioral assessments of the Student.
9. Prior to the Planning and Placement Team [PPT] meeting at the end of the Student's first grade year in spring 2004, Greg Smith, the behavioral consultant, had a discussion with the Parent regarding the Student's program. Mr. Smith explained his position that when a child's cognitive development split with his peers exceeds three years, teaching him in a mainstream classroom becomes increasingly challenging. In his testimony, Mr. Smith admitted that he told the Mother that the split between the Student and his same aged peers was widening, in terms of the learning style that was employed primarily in the classroom, and that as one moved up in the elementary school, it becomes less developmentally based, less hands on, more lecture, more discussion, more concepts. Mr. Smith expressed this concern to the Mother that at some point it would be difficult to have the child mainstreamed and receive an effective education. The Mother disagreed with Mr. Smith's approach, and Mr. Smith suggested that he might not be the consultant to go forward with this team. [Testimony Mr. Smith] After this conversation, the Parent was concerned that the school team did not know how to place the Student in regular classes. [Testimony Mother] Mr. Smith subsequently resigned as consultant to the Student's program in the summer 2004. [Testimony Mr. Smith]
10. Prior to the annual review PPT, Ms. Wilcock, the special education teacher, met with the team and the Parents several times. In these informal meetings, and in other ongoing feedback, the teacher and the Parents attempted to develop a comprehensive program. They would go over the entire program a great deal because the Student's program is very complex, as he has a great deal of needs. [Testimony Ms. Wilcock] Ms. Wilcock also developed a proposed, draft schedule of the Student's day to go over with the Parents. [Testimony Ms. Wilcock; Exhibit B-93] This schedule is based on the next year's grade schedule in terms of lunch, recess, reading blocks, and their specials. Ms. Wilcock testified that when that class moves to the next grade level, the specials scheduled changes. That schedule is not given to Ms. Wilcock until just prior to the commencement

of the school year. The special education teacher shared the Student's schedule and the changes to it with the Parents on an ongoing basis. [Testimony Ms. Wilcock, Exhibits B-93, B-94, B-95]

11. Understanding the Student's schedule for classes, specials and related services was of utmost importance to the Parents as they desired the Student to be fully included in the regular education program at least 80 percent of the time. Therefore, it was essential for the Parents to have a full understanding of when the Student was pulled out from regular education classes. [Testimony Mother]
12. At the May 28, 2004 PPT meeting, the Parents shared their goals for the Student's education. They indicated that they wanted him to read, write, count, be accepted and valued in his school and have friends that are typical peers. They discussed modifying and adapting work in the classroom, and explained that they wanted the Student in the regular classroom with a consultant in the classroom. At the PPT meeting, the Parents objected to the amount of time the Student was going to be in the regular classroom. The Parents wanted 80 percent of the time, while the Board staff recommended 60 percent inclusion. The Parents sought additional consultation time between the regular education teacher and the special education teacher so that the teachers could coordinate, modify and adapt the regular education curriculum and address any concerns about the Student. The Parents asked for a consultant to support the Student's program. [Testimony Mother, Exhibit B-58] At the PPT, the Board agreed to the idea of a consultant, but the consultant was not selected at that time. [Testimony Ms. Hartranft]
13. Subsequent to this PPT meeting, the Parents provided the Board with a list of consultants to be considered to support the program. [Testimony Mother, Exhibit P-73] The Parent had requested that Dr. Kathleen Whitbread be the selected consultant, and the Board retained the consultant in July. [Testimony Mother] The Board director of special education agreed to Dr. Whitbread as the consultant, as she felt that it was important to use someone whom the Parents trusted. [Testimony Dr. Hartranft]
14. At the May PPT the following goals and objectives were proposed for the Student: GOAL 1: The student will increase appropriate school behavior; GOAL 2 – The student will increase independence while participating in classroom activities and routines; GOAL 3 – The student will increase social/life interaction skills; GOAL 4 – The student will increase the use of assistive technology; GOAL 5 – The student will increase early math skills; GOAL 6 – The student will increase early literacy skills; GOAL 7 – The student will improve gross motor skills and mobility in school environment; GOAL 8 – The student will demonstrate improved self-help skills for increased independence in school and functional routines 80% of the time; GOAL 9 – The student will demonstrate improved functional fine and visual motor skills for increased independence in school and classroom activities; GOAL 10 – The student will demonstrate improved sensory integration skills for increased independence in school and

- classroom activities 80% of the time; GOAL 11 – The student will increase the use of verbal approximation, modified sign to produce single words taken from a prepared list; GOAL 12 – The student will increase the use of verbal approximation and/or modified sign to produce 2-word combinations taken from a prepared list; GOAL 13 – The student will improve receptive language skills. [Exhibit B-58] Ms. Wilcock testified that the Parent did not object to any of the goals or objectives contained in the 2004-05 IEP goals and objectives. [Testimony Ms. Wilcock] All of the objectives were to be delivered in the classroom as well as outside the classroom, and embedded through the Student's day. [Testimony Ms. Wilcock] The Parents did not want toilet training as a goal in the Student's IEP for the 2004-2005 school year. [Testimony Mother]
15. The assigned staff working with the Student included Nancy Wilcock, the special education teacher; two paraprofessionals; Maxanne Kass, the speech and language pathologist; Joyce Schwalenberg, the physical therapist; and Karen Daigle, the occupational therapist.
 16. Nancy Wilcock is a certified special education teacher who has been working with the Student for three years. She has been the Student's case manager and trains staff who work with the Student. She has worked with students with severe disabilities for the past ten years in various settings, including the CCMC School, and in various capacities such as a paraprofessional and certified teacher. Brenda Pollack and Christine Corneau, the Student's paraprofessionals have also worked with the Student for three years. They are supervised by the regular education and special education teachers. During the 2004-2005 school year the only staff person who had not previously worked with the Student was the regular education teacher. The staff knew the Student's signs and were able to communicate effectively with him. [Testimony Ms. Wilcock] The Mother testified that the Student's special education teacher was dedicated, very hardworking and committed. The Mother reported that they had good rapport, communicated in meetings every other week for a half hour, and communicated often via phone. [Testimony Mother] Ms. Wilcock also worked a substantial amount of time in modifying the curriculum for the Student. [Testimony Ms. Wilcock]
 17. Maxanne Kass, the Board's speech and language pathologist, has a master's degree in speech pathology and audiology from the University of Connecticut, and a master's degree in special education from the University of Hartford. She has been a speech-language pathologist with the Board since 1981, and previously worked in the same capacity for the Hebron Board of Education. Ms. Kass completes all of the speech-language assessments at the Anna Reynolds School, and has been working with the Student for three years. The Student has made good speech and language progress, according to Ms. Kass, but still has significant communication needs. She has been working with the Student for three years, and had been trained by Greg Smith while he was the behavioral consultant. Ms. Cass described the Student's receptive language as that of a

- preschooler, and his expressive language skills were at a two year old level.
[Testimony Ms. Kass]
18. The speech and language pathologist's recommendations for the 2004-05 school year IEP goals and objectives were based on the Student's progress. She recommended that his speech and language services be delivered in her related services room because the skills she works on with the Student are difficult for him and require his undivided attention. She also stated that she wouldn't want to move his mouth and position him in front of the other children as that type of hands-on therapy is not the type of instruction provided to other children in the regular classroom. In addition, the speech and language pathologist indicated that it was appropriate to pull out the Student for the speech services so that he can be as loud as he wants to be when he produces sounds. She did not want the Student to feel inhibited in his sound production attempts. The speech pathologist noted that the major concern about pullout services is that sessions are more effective when provided in a quiet room without distractions. Involving other students in the direct services provided to the Student would not be appropriate, as the other students would be more like spectators and it would not be beneficial to them.
[Testimony Ms. Kass]
 19. The PPT, including the Parent, agreed that the speech/language services should be delivered one-to-one in the related services room for the 2004-05 school year. [Exhibit B-58] The paraprofessionals attend the speech services, to assist in imbedding the goals and objectives in the remainder of the Student's school day. [Testimony Ms. Kass] The Student prefers to attempt to say words, rather than using sign language, although the Student is inconsistent in his verbal attempts and approximations. [Testimony Ms. Kass] Therefore, it is appropriate to pull the Student out to work on his preferred method of communication through direct services.
 20. Joyce Schwalenberg is the Student's physical therapist. She has a B.S. from the University of Connecticut with a major in physical therapy. She is licensed to practice physical therapy in Connecticut, and has been working as a PT for the Board for ten years. Prior to that, she worked in Windham for 12 years. Ms. Schwalenberg has worked with the Student for six years. [Testimony Ms. Schwalenberg] She described his ability to negotiate the stairs as better and his ability to balance and utilize playground and gymnastic equipment as improving. [Testimony Ms. Schwalenberg; Exhibit B-58] While the Student previously had naps, he rarely naps now. He used to ride in a little wagon because by the end of the afternoon he was so tired, but now he walks with his peers all day and he's almost keeping pace with them in the hall. [Testimony Ms. Schwalenberg] Overall muscle strength and endurance and gross motor skills have improved a lot, but he still does have significant delays when compared to his same age peers. During the 2004-05 school year the Student received direct PT services in the adaptive physical education class. [Exhibit B-58] The physical therapist communicates with the Student through signs and by speaking to him. The

- speech pathologist and special education teacher would update the PT on the signs that the Student was using. [Testimony Ms. Schwalenberg] The last time the PT had received a written behavioral plan for the Student was a few years ago. [Testimony Ms. Schwalenberg, Exhibit B-82]
21. Karen Daigle has been the Student's occupational therapist since he was three years old. She is licensed in the State of Connecticut and certified nationally, and has attended various conferences through the American Occupational Therapy Association on various disabilities and school system occupational therapy as well as sensory integration. She has been working for the Board for approximately eight years. Ms. Daigle testified that the Student has difficulty with many fine motor and visual motor activities that directly affect either his academics or his self-help activities. [Testimony Ms. Daigle]
 22. Ms. Daigle described that the Student's functioning has changed dramatically since he was three. When he was three years old, she had a difficult time getting him to participate in the fine motor or visual motor activities that one would like him to participate in as a preschooler. Ms. Daigle explained that she can now engage him by using different materials, blocks, puzzle pieces, pencils or crayons, whereas previously he would have more behavioral incidents, throwing items or placing them in his mouth. Ms. Daigle noted that now she is able to get him to a place where he can actually start to manipulate a lot of those things to get more skill out of him. Ms. Daigle also noted that his sensory needs have somewhat changed since then. While the Student continues to engage in activities such as spinning himself in the middle of the room, it's much more diminished than when he was three years old. [Testimony Ms. Daigle; Exhibit B-58]
 23. During the 2003-04 school year the Student did quite well on his OT objectives – mastery on a few, and satisfactory or above on the rest of them. [Testimony Ms. Daigle; Exhibit B-58] The goals/objectives for the Student were proposed for a more functionally based way to get to his fine and visual motor skills. [Testimony Ms. Daigle] She recommended that her direct services be provided in a one-to-one setting to see specific skills from him, especially the self-help skills. She also made this recommendation because there was clothing that needed to be removed with some of her proposed objectives. Ms. Daigle also has a sensory diet for the Student which she goes over every year with the teachers at the beginning of the year. The Student did not require any scheduled sensory breaks or intensive sensory integration during the 2004-05 school year. The Student required to be pulled out for specialized instruction one on one, as the Student was easily distracted and the instruction required full attention. The skills learned in the one on one sessions were also worked on in the regular education classroom to generalize the skills. [Testimony Ms. Daigle]
 24. The IEP for the 2004-2005 school year did not appropriately reflect the number of hours that the Student would be removed from the regular education setting for work on the goals numbered 1 through 6, indicating that the total of 32.5 hours of

- special education instruction would be provided in both the regular education setting and the resource/related service room. He was also scheduled for physical therapy for 30 minutes per week. That was listed as a regular education service, although the Student was in the adaptive physical education class which was predominately with other disabled children. The IEP also listed related services of one hour per week of occupational therapy and one hour per week of speech and language therapy. It is completely unclear from the IEP how the Board calculated the numbers of hours per week the Student would spend with nondisabled peers from the IEP itself, although the document lists that figure as 19.5 hours. The IEP also notes discretionary reasons for removal, noting that the Student “may receive individual and/or small group instruction away from the regular education class to increase attention/focus to task,” and “may [be] instructed in an alternate setting to limit distractions and work explicitly on individual education plan.” [Exhibit B-58] This IEP discussion of hours of removal from the regular education class is wholly inappropriate, as it is unduly vague and discretionary.
25. In addition, the amount of pull out time for the 2004-2005 school year could have been decreased if the team had completed a functional behavioral assessment to better address the Student’s behavioral issues. By the Board’s own guideline for completion of a functional behavioral assessment [FBA] and behavioral intervention plan, the Board should have conducted an FBA and drafted a behavioral intervention plan. In its own guidelines, it was explained that the Board should conduct an FBA, “not just for students identified as [seriously emotionally disturbed],” . . . but also when a “[s]tudent’s problem behavior persists despite teacher’s strategies that may have been based on less comprehensive and systemic method of assessment and intervention,” . . . “[s]tudent’s problem behavior places the student or others at risk,” and “[t]eam is considering more intrusive interventions or more restrictive placement based on problem behavior.” [Exhibit P-108]
26. The Student’s second grade teacher during the 2004-2005 school year was Holley Mazur. She consulted on a regular basis with the special education teacher Ms. Wilcock regarding curriculum modifications and inclusion strategies for the Student. The special education teacher and the classroom teacher met one to two hours per week throughout the school year. Ms. Mazur was also trained by Ms. Wilcock and began such training the previous school year by observing and getting to know the Student. [Testimony Ms. Mazur]
27. The classroom teacher noted that the Student was only removed from the regular education classroom three times in the year due to behavioral issues. The Student made some behavioral progress during the 2004-2005 school year, but it would depend on the day and a variety of factors, such as who was with the Student, how he felt that day or whether he was tired. The Student was removed from the classroom when he interacted physically and caused harm to another person. Timeouts were also used in the classroom. [Testimony Ms. Mazur]

28. The classroom teacher did not have a written behavioral plan for the Student, but was trained by the special education teacher on methods of dealing with the Student's behavior. These methods included using time outs and putting distance between the Student and his classmates before the behavior would escalate. [Testimony Ms. Mazur]
29. The Student's regular education/classroom teacher believes it is appropriate that the Student be educated in the regular class. When this second grade teacher was teaching the Student, she saw the benefits of inclusion. The Student benefited through interactions with peers when he developed communication and social skills and, his work on academic skills improved as long as the work was aligned with what is appropriate for him. This teacher noted that the Student loves to be in school, is inquisitive, very kind and loving and enjoys being around people. The classroom teacher did modify the concepts and curriculum for the Student and incorporated as much of the second grade curriculum for the Student as possible. She would meet with the special education teacher as needed to work on these modifications. [Testimony Ms. Mazur]
30. Connecticut Children's Medical Center [CCMC] completed an evaluation of the Student in the late summer/fall of 2004. [Exhibit B-64] In the CCMC evaluation, the psychologist was unable to determine the Student's cognitive levels, but opined that the Student's performance was comparable to that of an average child of age 3 to 4, with social interaction, communication skills and personal living skills comparable to that of the average child at about age 2 and community living skills at less than age 2. [Testimony Dr. Riccio, Exhibit B-64] According to the inclusion consultant, it is not unusual in the IQ testing of children with intellectual disabilities to have difficulty in finishing the testing. [Testimony Whitbread] The CCMC evaluator saw a high degree of distractibility in the Student, a lack of focus. [Testimony Dr. Riccio] The Parents were dissatisfied with the CCMC evaluation as it recommended a functional curriculum. [Testimony Ms. Hartranft, Mother]
31. In the CCMC evaluation and recommendations, a functional behavioral assessment [FBA] was recommended. [Exhibit B-64] An FBA is an assessment that looks at why the child is engaging in a particular behavior and might involve interviews, observations and analysis of data to determine patterns. This information is used to make an educated analysis of why a student is doing the behavior. For many children, behavior is a way of attempting to communicate when the children are unable to express themselves any other way. All people who work with the child should be included in the FBA to address whatever the behavior is trying to tell you. Behavioral issues were an impediment for the Student. [Testimony Dr. Whitbread]
32. At some point in the fall 2004, the director of special education learned that the CCMC report was not including the requested assistive technology evaluation.

- [Testimony Ms. Hartranft] At that time, the Parents requested that the Board hold off on completion of an assistive technology evaluation until the evaluation by the inclusion consultant was completed. [Testimony Ms. Wilcock]
33. The inclusion consultant completed her educational evaluation on December 13, 2004. [Exhibit B-65] While the Parents wanted the inclusion consultant to complete the evaluation earlier, the Parents agreed to the consultant's timetable for completion of the evaluation. [Testimony Mother]
 34. The inclusion consultant has a bachelor's, masters and doctoral degree in special education. She has been consulting with school districts on how to place students with intellectual disabilities in the regular classroom for 25 years. [Testimony Dr. Whitbread]
 35. The inclusion consultant's evaluation was completed after a record review, a parental interview and home observation and a classroom observation and interview with school staff working with the Student. The consultant believed she had sufficient time to observe the Student. She observed the Student for two hours in the regular education classroom. At one of the regular education observations, the Student had a substitute teacher. [Testimony Ms. Whitbread] The inclusion consultant did not conduct any assessments of the Student. [Exhibit B-65] The inclusion consultant didn't observe the Student working with the speech/language therapist. [Testimony Dr. Whitbread, Ms. Kass]
 36. The inclusion consultant reviewed the Student's IEP for the 2004-2005 school year and found that parts of it were appropriate and some portions of it she would recommend would be different. The concerns that she voiced regarding this IEP was that there should be a more systematic behavioral plan and more focus on literacy. She also thought the Student should be included academically with an adapted curriculum and that the regular education and special education teacher be provided with additional consultation time. [Testimony Dr. Whitbread]
 37. In her conclusions, the inclusion consultant noted that the Student required time when he was pulled out of the regular classroom for literacy instruction. The focus of this systematic and intensive literacy instruction was to work on phonological awareness. Based on her observations, the inclusion consultant agreed that the Student was distracted in the regular education environment and would also be distracted by noise and interruptions in the related services pull-out room. [Testimony Dr. Whitbread] It is clear from the testimony that the Student requires time outside the classroom for instruction and related services.
 38. For that intensive literacy instruction, the inclusion consultant noted that the Student needed an area for quiet instruction for reading. The pullout time for direct literacy instruction was recommended to be 30 to 40 minutes per day. The inclusion consultant noted that the Student was functioning at a pre-K level in terms of literacy. In terms of phonological awareness, the Student is learning to

- recognize the sounds. In her discussion with the Board staff, the consultant learned that the staff was familiar with the early Wilson program, which would be an appropriate multisensory structured language program. This program, called Foundations, was recommended by the inclusion consultant. [Testimony Dr. Whitbread]
39. The inclusion consultant disagreed with the CCMC functional approach and felt that the CCMC evaluation was an overly pessimistic view of the Student and his future. The inclusion consultant felt that the Student needs to learn functional skills, but that should not be the only focus. Dr. Whitbread also agreed that the Student required learning of functional skills and the ability to generalize those skills. [Testimony Dr. Whitbread] The Parent disagreed with teaching the Student functional skills. [Testimony Mother] The Parents wanted the functional skills to be taught at home with the focus on literacy at school. [Testimony Ms. Wilcock]
40. The consultant relied on research which indicated that if exposed to general education, particularly in the area of reading, students with intellectual disabilities have more positive outcomes. [Testimony Dr. Whitbread, Exhibits P-102A-G] The consultant also noted that children who are educated in the regular education placement 80 percent or more of the time feel more a part of the class, which improves the child's self esteem. At the time of the observation, the Student was in the general education classroom 60 percent of the time. [Testimony Dr. Whitbread]
41. The school based members of the team found little new information in the inclusion consultant's evaluation. There was a great deal of record review in the report and most of the information could be found in other evaluations or documents in the school. The Board staff was already doing planning pyramids on a regular basis, a recommendation in Dr. Whitbread's report. They were already using literacy instruction, including parts of the specific literacy program, Foundations, that was recommended by the inclusion consultant. The inclusion consultant gave the Board staff no substantive recommendations for changes in the goals and objectives. The only revision to the goals and objectives recommended by the inclusion consultant was an increase in the goal for the acquisition of letter sounds. [Testimony Ms. Wilcock]
42. The inclusion consultant recommended that an assistive technology evaluation be completed, including looking into the area of augmentative communication, as the Student appeared to require a different way to communicate rather than verbally. The Student's frustration level warranted looking into this area. The other recommendations made by Dr. Whitbread included, in agreement with CCMC's recommendation, that an FBA be completed, a consultation with a teacher of the hearing impaired, literacy instruction, and more time placed in the regular education setting. [Testimony Dr. Whitbread]

43. After review of the inclusion evaluation, the speech pathologist found that there was nothing that needed to be changed in terms of provision of speech services. The Student continues to require direct one on one speech services to allow him to focus completely. It is beneficial to him to have these pull out services. The speech therapist was concerned that the Student had to be producing consistent sounds in speech for the initial sounds portion of his literacy instruction. [Testimony Ms. Kass] The special education teacher shared this concern that the Student must have a consistent sound to a letter to make progress in reading. It doesn't have to be the correct sound, just a consistent sound. [Testimony Ms. Wilcock] The inclusion consultant agreed that the child must have the fundamental ability to make the same sound for a particular letter to progress in the literacy program. [Testimony Ms. Wilcock]
44. The inclusion consultant agreed that some speech and language services could be provided as pull out services in a related services room. While the consultant recommended that some of the speech/language services should be provided in a regular classroom, this runs somewhat counter to her testimony that the delivery of literacy instruction should be in a quiet room free of distractions. [Testimony Dr. Whitbread] Based on the distractibility noted by the inclusion consultant in her observations, it is reasonable for other related service providers to provide their instruction to the Student in a similar room free of distractions in order to make progress on his goals. Moreover, in her testimony Dr. Whitbread agreed with the proposal to have speech and language services provided in the 2005-2006 school year in a related service room for five sessions, followed by a sixth session in the regular classroom.
45. The inclusion consultant attended the PPT meeting on February 11, 2005 and discussed her recommendations and report at the PPT. The consultant was approved for further consultation for the remaining hours on her contract. The consultant never requested additional time during the winter and spring 2005 for consultation with the Student's teachers, although at times, during her testimony she opined that the time was insufficient to meet the team's needs for the Student. [Testimony Dr. Whitbread]
46. When the consultant returned to observe the literacy program, she was thrilled with how it was going and noted that the paraprofessional was wonderful in her implementation of the program. [Testimony Dr. Whitbread]
47. The inclusion consultant attended the April 15, 2005 PPT, which was the Student's annual review, for discussion of progress. [Testimony Dr. Whitbread, Exhibit B-74] The PPT members agreed to conduct a functional behavioral assessment [FBA]. The goals for the 2005-2006 school year were discussed by the team, as well as placement in the regular education program. [Testimony Dr. Whitbread] The Parents wanted the inclusion consultant to be retained for the next school year, but the school based members of the team indicated that they didn't need additional assistance in inclusion. [Testimony Mother] The Parents

- also felt there was insufficient consultation time between the regular education teacher and the special education teacher included in the IEP, although the teacher testified that sufficient time was provided for planning. [Testimony Mother, Ms. Mazur]
48. The Parents did not request that the goals and objectives for the 2005-2006 school year be changed. Their dispute for the 2005-2006 school year is the time the Student would spend in regular classes with proper support to ensure that he would be successful. [Testimony Mother]
49. The inclusion consultant concluded that the 2005-2006 IEP was not appropriate, as she considered the bar too low for the Student. She felt that the expectations on the number of sounds per year was extremely low, although she would agree that the letter sounds could be set at the lower number and could be reconsidered and revised at a quarterly review. The consultant further opined that the goal of the school year should be to place the Student in regular education 80 percent of the time or more. The consultant did not believe that this should be done immediately and that it would take some time to set it up. The 80 percent threshold was something to work towards gradually. She also noted that an FBA should be in place, that an assistive technology evaluation should be completed, and that the team has access to a mutually acceptable independent consultant to help the team problem solve. [Testimony Dr. Whitbread] Dr. Whitbread had shared with the team that greater inclusion was to be a gradual progress to work toward. [Testimony Ms. Mazur]
50. The discussions that the PPT had as to the percentage of inclusion were long and tedious. [Testimony Dr. Whitbread] There was a long discussion about whether the Student was in the classroom 68, 70 or 80 percent of the time. [Testimony Ms. Kass] Ultimately, the time with nondisabled peers for the 2005-2006 school year was calculated at between 23.75 and 24.25 hours per week, in the 74 percent range. [Testimony Mother, Exhibits B-74, B-76]
51. The Parents felt that the appropriate supplementary aids and services that were not considered for the 2005-2006 school year were continuation of the inclusion consultant, an FBA, and additional consultation time for the teachers. [Testimony Mother]
52. The Parents agreed with the Board's proposal that a teacher for the hearing impaired consult with the team, but they objected to the psychiatric evaluation as the Board had not appropriately explained why it required the expertise of a psychiatrist to evaluate the Student. In her testimony, the Mother agreed that a mutually acceptable consultant, such as Dr. Ann Majure, would be an integral part of the Student's success and placement in the classroom. The Parents felt the consultant should be involved in all aspects of the program, and not be impaired by fiscal limitations. The Parents want one consultant who could assist in

- placement in the regular education classroom and in the completion of an FBA. [Testimony Mother]
53. The only curriculum recommended by Dr. Whitbread was the literacy/reading curriculum. For the other areas, the consultant recommended that the Student should access the third grade curriculum by participating in modified activities within the curriculum. For example, while the other students are working on multiplication, he may be counting three sets of 10. If a reading story is on a third grade level, he could have pictures in front of him sequencing the story. He should participate in the context of whatever everyone else is doing. [Testimony Dr. Whitbread] The Student was receiving the Foundations instruction. Dr. Whitbread recommended that that instruction be provided more precisely, which the Board staff did, upon her recommendation. [Testimony Ms. Wilcock, Exhibit 84]
 54. While the Parents disagreed with many of the recommendations and the functional focus of the CCMC evaluation, they agreed that an FBA should be completed. [Testimony Mother] The Board staff attempted to complete an FBA, and felt it was important to have the Parents' input into the FBA. The Parents, however, failed to cooperate with the completion of an FBA, as the Parents did not want to participate in any meetings after the first FBA meeting. [Testimony Ms. Wilcock; Exhibits B-77, B-81]
 55. The inclusion consultant was unaware that the Board staff was working on an FBA, but assumed they were doing so, as they were tracking behavior in the spring 2005, which she assumed would be used as baseline data for an FBA. [Testimony Dr. Whitbread]
 56. The Student was transitioning to a new special education teacher and regular education teacher at the beginning of the 2005-2006 school year. [Testimony Ms. Wilcock] As the Student transitions to new teachers, it is essential that all staff working with the Student learn of the plan to address the Student's behavior with unfamiliar staff and the Student's other behavioral issues. Thus, it is necessary to have a functional behavioral assessment completed and a written behavioral intervention plan in place, so that all staff working with the Student would have full access and understanding of the behavioral plan with appropriate, consistent interventions for the Student.
 57. The behavior issues for the Student were so serious that the director of special education stated that the Student might have to have an out of district placement. [Testimony Ms. Wilcock] The Board staff testified that the Student was not removed from the class frequently due to negative behaviors during the 2004-2005 school year. [Testimony Ms. Mazur, Ms. Wilcock] The Student would be removed from the group for a period of time, however, in response to these incidents. [Testimony Ms. Mazur] While many of these incidents were mild, they were also inhibiting the Student from receiving an appropriate education, to

- the point that the director of special education and the former behavioral consultant were recommending an out of district segregated placement. The Board uniformly testified that they used certain “protocols” in response to the Student’s behavior, although the documents referenced as setting forth these “protocols” were written over the years, and some were drafted several years ago. There was also inconsistency in the “protocols” as staff members were either trained by someone on these “protocols” or referenced older intervention plans. The Board staff and its behavioral consultant should have addressed the behaviors in a comprehensive manner, in a functional behavioral assessment prior to attempting such an assessment in May 2005. While the Parents should have cooperated in the completion of the FBA at that time, the Board should have completed one much earlier than the spring of 2005.
58. Board staff noted that having someone on the team who could assist them in how to deal with the Student’s behavior would definitely be beneficial to the team. The OT agreed that an FBA should be conducted, and in the FBA the sensory needs of the Student should be considered. [Testimony Ms. Daigle]
 59. In June 2005, the former behavioral consultant returned to the school to consult with the staff. [Testimony Mr. Smith, Exhibit B-79] The proffered reason for this return to the Student’s program was that the Student was having difficulty dealing with unfamiliar staff. Nevertheless, this problem had been occurring for quite awhile. [Testimony Mr. Smith]
 60. As of the 2005-2006 school year, the Student has a behavioral consultant, a hearing impairment consultant and an assistive technology consultant. [Testimony Ms. Wilcock] The behavioral consultant who has been retained is reviewing whether she can be of assistance to the Student’s program. She was on the list of inclusion specialists that the Parents provided to the Board in the summer 2004. [Exhibit P-73]
 61. The assistive technology evaluation, completed at a later time in accordance with the Parents’ request, was not reviewed at a PPT prior to this hearing as the Parents indicated that they weren’t available for a PPT until September. [Testimony Mother]
 62. The Board posits that a psychiatric evaluation is warranted as it is another resource for further information about the Student to help them meet the needs of the Student. [Testimony Ms. Mazur] That is an insufficient basis to require the evaluation in the absence of the Parents’ consent, particularly in light of the testimony of the witnesses regarding the evaluation. The CCMC psychologist indicated that a psychiatric evaluation would be helpful only if the Parents are interested in a medication consultation around the issues of distractibility and inattentiveness. [Testimony Dr. Riccio] The Parents have indicated no such interest in a medication consult in testimony at the hearing.

DISCUSSION/CONCLUSIONS OF LAW:

It is undisputed that the Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq. The issues that must be addressed in this decision are whether the Board has provided the Student an appropriate program for the 2004-2005 and 2005-2006 school years, and whether the Board placed the Student in regular classes and removed him from that environment only when he could not be educated satisfactorily in regular classes with supplementary aids and supports and modifications to the general curriculum for these years as required by 20 U.S.C. §1412(a)(5)(A). The remaining issue is whether the hearing officer shall override the Parents' lack of consult to the psychiatric evaluation requested by the Board.

I. Burden of Proof

The Supreme Court recently addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. ____, No. 04-698 (U.S. 2005). In *Schaffer*, the Court noted that states have responsibility generally for establishing fair hearing procedures. The plain text of IDEA is silent in the allocation of the burden of persuasion, as was the Maryland state law. Under those circumstances the Court found that the burden of persuasion/burden of proof falls upon the party seeking the relief. The Court declined to decide the issue of the burden of proof when states have their own laws or regulations which place the burden on the school district.

In Connecticut, the regulations expressly state that the Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 In a careful reading of the Court's decision in *Schaffer*, it is found that the Board continues to have the burden of proof in this state as is specifically stated in the regulations². The Board has not met its burden in this case as to the program for the 2004-2005 school year, and as to whether the Student was removed from regular education only when he could not be educated satisfactorily in regular classes with supplementary aids and supports, and modifications to the general curriculum for the 2004-2005 school year.

II. Free Appropriate Public Education

The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

The requirement of a free appropriate public education is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley*, 458 U.S. at 201

² Interestingly, in his dissent, Justice Breyer indicated he would remand the case because the state ALJ should have considered state law under the rules of state administrative procedures and the body of state administrative law, rather than looking to federal law for a burden of persuasion rule. Justice Breyer pointed out that the IDEA says that the establishment of procedures is a matter for states, and that the administrative hearing is to be conducted by the State or local educational agency. The statute as a whole foresees state implementation of federal standards. *Schafer, Id.*

Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. *Board of Education v. Rowley*, 458 U.S. at 203

The IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Hendrick Hudson v. Rowley* 458 U.S. at 204. When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* This standard, however, contemplates more than mere trivial advancement. *Id.*

The Student has received more than a trivial educational benefit from the educational program provided by the school district. The Student has made progress on his goals and objectives and is beginning to learn to read, write, do math, and follow school routines.

III. Inclusion of Student to the Maximum Extent Appropriate

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 ("LRE"); that is, to the maximum extent appropriate, children with disabilities are to be removed from the regular education environment "...only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. Section 1412(a)(5)(A); 34 C.F.R. Section 300.552(e)

also requires school districts to ensure that “[a] child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general curriculum.” Mainstreaming was not at issue in *Rowley*; the Court assumed that the mainstreaming requirement had already been met. *Greer v. Rome City School District*, 950 F.2d 688, 695 (11th Cir. 1991).

The statutory preference for including disabled children in regular education must be balanced with the need to provide an appropriate, individualized education to meet their unique needs. Post-*Rowley* case law has provided some guidance as to how this balancing act should occur. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) created a two-part test for determining whether education in the regular classroom, with the use of supplementary aids and services, can be satisfactorily achieved. If placement outside the regular classroom is necessary for the child to receive educational benefit, then it must be determined whether the school has made efforts to include the child in regular education to the maximum extent appropriate. See *Poolaw v. Bishop*, 67 F.3d 830, 836-37 (9th Cir. 1995); *Carlisle Area School v. Scott P. By and Through Bess P.*, 62 F.3d 520, 532 (3rd Cir. 1995); *Sacramento City Unified School District, Board of Education v. Rachel H. By and Through Holland*, 14 F.3d 1398, 1404-05 (9th Cir. 1994).

The court in *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204 (3rd Cir. 1993) also adopted the *Daniel R.R.* test emphasizing that the school district must consider the whole range of supplementary aids and services appropriate for the child’s particular disabilities. In addition, the school district must make efforts to modify the regular education curriculum. The *Oberti* court states that if the school district did not give serious consideration to both modifying the general

curriculum and including the child in a regular education class then they have probably violated the IDEA mainstreaming directive. The *Oberti* court also asserts that exclusion from a regular education classroom is not justified by the fact that a disabled child learns differently than other children in that classroom.

In *A.S. v. Norwalk Board of Education*, 183 F.Supp.2d 534 (D.Conn. 2002), the court concluded that *Oberti* and *Daniel R.R.* prove the appropriate legal standard for mainstreaming issues. The court adopted the test used in *Oberti* in concluding that a disabled child should and could remain in regular education with additional supportive services.

In the more recent case of *R.L. v. Plainville Board of Education*, 363 F.Supp.2d 222 (D.Conn. 2005), the court held that the PPT had appropriately considered the appropriate aids and services that are available to support the child in the regular education classroom setting, but agreed with Board staff that the positive effects of mainstreaming had to be balanced with the need to teach the student skills that could not be provided in that setting. The court held that the student's real academic progress depended on the success of her segregated instruction, "...something (which at least initially) required her to be taught in a more isolated and focused environment." *Id.*

In February 2002, a settlement agreement was reached in the case of *P.J. v. State of Connecticut Board of Education*, No. 2:91CV00180 (RNC). Class members of this suit included all school-age children with the label of mental retardation who are not educated in regular classrooms. The parties to this settlement agreed that the desired outcomes for educational programs for students with mental retardation or intellectual disability would consist of five goals. Those goals pertinent here include, "An increase in the percent of

students with mental retardation or intellectual disability who are placed in regular classes, as measured by the federal definition (eighty (80) percent or more of the school day with non-disabled student)...An increase in the mean and median percent of the school day that the students with mental retardation or intellectual disability spend with nondisabled students...An increase in the percent of students with mental retardation or intellectual disability who attend the school they would attend if not disabled (home school).” In addition, it was agreed that a policy memo would be issued by the Chief of the Bureau of Special Education and Pupil Services of the Connecticut State Department of Education that would include directives for PPTs including the requirement that the PPT consider the placement of the student in regular classes with supplementary aids and services. Nothing in the *PJ* Settlement rejects the importance of making an individual determination about the individual student. While mindful of the goal of full inclusion, the student’s needs are not subordinate to a systemic goal of increasing the number of students at full inclusion at 80 percent or more of the school day. In this case it is noteworthy that the inclusion consultant did not recommend that the Board immediately move to the 80 percent inclusion level. Rather, she recommended that that level be phased in over a period of time. And, this inclusion consultant indicated that for reasons of focus, attention and appropriate delivery of services, the child should have pull-out services.

The mainstreaming provision of the IDEA is a presumption, not an inflexible mandate. *Doe v. Arlington County Sch. Bd.*, 41 F.Supp.2d 599, 603 (E.D.Va. 1999). A PPT must first assume that disabled children will be fully included in the regular education environment. Only then, after serious consideration is given to including the

child in the regular education classroom with the full range of supplementary aids and services and modification of the general curriculum, can the PPT consider why, where and when each disabled child may need to receive some or all of his education elsewhere.

Evidence of whether this school district has seriously considered regular education with supplementary aids and services is to be found within the disputed IEP as well as testimony of the Student's parent and school staff. Under 20 U.S.C. Section 1414(d)(1)(A), an IEP must include (among other requirements as stated in the statute) a statement of the child's present level of educational performance including how the child's disability affects the child's involvement and progress in the general curriculum, a statement of measurable goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum, a statement of the special education and related services and supplementary aids and services to be provided to and/or for the child and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved and progress in the general curriculum.

In this case, a review of the PPT minutes, IEP documentation and the testimony of all the witnesses including the Parent and the consultant, Dr. Whitbread, who attended the PPT meetings, leads to the conclusion that the PPT gave serious consideration to the substantially full time (at least 80%) placement of the Student at the PPT meetings addressing the IEPs for the 2005-06 school years. No such consideration was evident in the planning of the program for the 2004-2005 school year.

Dr. Whitbread testified that the discussion about the inclusion time for the Student was "tedious" down to whether the Student's time going to the bathroom should be

considered regular or special education – a question which was ultimately deferred to the Connecticut State Department of Education. More importantly, however, Dr. Whitbread, herself, believed that the Student needed pullout services for intensive reading and math instruction. Dr. Whitbread also agreed with the recommendation of the speech/language consultant to provide services to the Student one session out of six directly in the regular education classroom, with five sessions in the related services classroom. The Student has computer programs in the classroom to assist him with the reading and writing as taught in the regular education classroom. In addition, the special education teacher comes into the regular education classroom to co-teach during certain time periods. The Student also has two paraprofessionals that assist him throughout his day and back up assistants available if they are out of school. In June, 2005 the PPT also recommended a mutually agreeable behavioral consultant after determining that Dr. Whitbread was not the preferred consultant. Similarly, there was ample discussion about modifying the general curriculum to meet the Student's needs. It is clear that the regular education placement with supplementary aids and services, instruction in the general curriculum (modified as needed) were discussed often by the school district.

The Parents and the inclusion consultant assert that the Student was not provided appropriate supplemental aids and services for the 2004-2005 school year, as he was not provided with an assistive technology evaluation, there was no appropriate modification of the general education curriculum, a functional behavioral assessment with an appropriate behavioral intervention plan was not completed, the retention of an inclusion consultant was not considered at a PPT, the teachers were not provided appropriate consultation time, the related services (speech/language, OT and PT) were delivered in

segregated settings and the staff was not provided appropriate training and technical assistance.

The Board did request that CCMC provide an assistive technology evaluation and when it learned that CCMC was not able to complete the evaluation it took appropriate actions to secure an AT evaluation. This AT evaluation could be of great assistance in addressing the Student's lack of ability to communicate, which very well may be contributing to his behavioral issues. The Parents requested that the evaluation be completed after the inclusion consultant completed her assessment. Then, once the evaluation was completed, the Parents chose to defer the convening of a PPT to discuss the AT evaluation. The Board took appropriate steps to attempt to provide an AT evaluation during the 2004-2005 school year.

The evidence presented supports the conclusion that the general curriculum was modified by the teachers and they had appropriate technical assistance and training to adapt the regular education curriculum for the Student. The teachers testified that they had sufficient time to consult for such modifications and adaptations, although they took it on their own initiative to make the time for such a consult beyond their specified consult time. The teachers should have been allocated more time in the Student's IEP for this consultation, rather than having to take their own time to do so. In addition, the IEP document left the Student's time in regular classroom versus the time in the resource/related service room completely discretionary. That is utterly inappropriate.

The OT and the speech/language providers delivered their services in the related service setting for appropriate reasons, to provide the Student with the services he required to progress in his goals and objectives and in the regular education setting. It is

not found, however, that the adaptive physical education setting was a regular education setting and it is found that the PT should have been provided in a regular education physical education setting.³

The Student's behavior was an issue that was not appropriately addressed in the 2004-2005 school year. Discussion relating to developing a functional behavioral analysis and behavior plan was important because the Student's behavior disrupted delivery of educational services to him and served as an impediment to placing him in regular classes. It is not appropriate to have a "protocol" to remove a child from regular education for maladaptive behaviors unless an appropriate functional behavioral assessment and behavioral intervention plan are developed. The Board, at various times in the hearing, asserted that the documents marked as Exhibits B-80, B-82 and B-91 were the Board's behavior plans. None of these documents, however, were reviewed by the PPT and none of these behavioral plans were appropriate. There were no appropriate behavioral intervention plans for the Student, just "protocols" followed by the staff and drafted by a consultant who is found to be an inappropriate behavioral consultant for this Student. The consultant testified that the Student should not be in the classroom due to his intellectual age and should be moved into a restrictive setting. The consultant did not have the appropriate educational background and experience to make such an assessment. His opinion was given too much weight by the Board. The strategies that the Board used were ineffective and inappropriate and resulted in the behavior worsening. The Board was aware of these behavioral problems, requesting that its former behavioral consultant, the one that the Parents no longer wanted to work with the Student, consult as to the

³ During the 2004-05 year up until April 2004, the adaptive PE class utilized the gym and had one nondisabled student. From April 2005 through the 2005-06 school year, the Student would participate in the regular PE class with assistance from the PT.

Student's behavior in June 2005. While there were no major behavioral incidents until the spring, behavior was getting in the way of appropriate education throughout the year. Moreover the 60 percent inclusion in that school year was not verified by the IEP and if the Student's inclusion was at that level, it was not appropriate. The Board was required to include the Student in general education for more time during that school year.

According to testimony, the Student was being mainstreamed approximately 63% of the time during the 2004-05 school year, and approximately 73% of the time during the 2005-06 school year. The Student participates in all specials, lunch, recess, and a majority of the time he is placed in a regular education classroom. Similar to the student in *R.L. v. Plainville*, the Student has areas that he needs to focus on outside the classroom in order to learn. Dr. Whitbread, the inclusion consultant, described this segregated time as necessary for intensive instruction. Section 1412(5)(B) explicitly states that mainstreaming is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Mainstreaming is "ultimately a goal subordinate to the requirement that disabled children receive educational benefit." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1002 (4th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 688 (1998).

It is therefore concluded that FAPE was not provided for the 2004-2005 school year as the behavioral issues were not appropriately addressed, the inclusion time was discretionary in accordance with the IEP and appropriate consideration was not given to mainstream the Student more than 60 percent of the school week.

The Parents chose not to contribute to the FBA for the 2005-2006 school year, perhaps because this hearing request was pending. The Parents should have cooperated with the team to develop a functional behavioral assessment. The Board cannot be faulted with this lack of cooperation. While by the conclusion of this hearing, the FBA had not yet been completed, the Board cannot be responsible for this lack of cooperation from the Parents.

The IEP for the 2005-06 school year is appropriate and addresses the Student's strengths and weaknesses and provides appropriate modifications and adaptations to the regular education environment to allow him to participate to the maximum extent appropriate.⁴ In addition, the Board provided adequate supplementary aids and services to the Student and the staff assigned to the Student's program during the 2005-2006 school year. The school district's actions during the 2005 school year met the standards raised in *Daniel R.R., Greer, Oberti*, and *R.L.* The IEP for the 2005-2006 school year also complies with the spirit of the *P.J.* settlement. As stated by the *Oberti* court, if serious consideration was given both to modifying the general curriculum and including the child in the regular education classroom, then the IDEA mainstreaming requirement has probably been met. In the Student's case, it is clear that serious consideration was given to both factors. Finally, the Parents claim that the Board put restrictions on Dr. Whitbread when she was contracted to be the inclusion consultant. Dr. Whitbread testified that she signed a contract with the Board after proposing a certain amount of hours that she would need for the school year. Even if it were to be found that the Board placed restrictions on Dr. Whitbread, the consultant testified that she had an appropriate

⁴ The Board and the Parents, however, must complete the FBA at this time to address the Student's behavioral issues.

amount of time, in her opinion, to provide the consultation services to the Student when she testified on rebuttal. The Parents' claim in this regard must therefore fail.

The Board is now providing an appropriate consultant for the 2005-2006 school year, one who has experience in inclusion and behavioral issues. The Parent testified that she believes that Dr. Ann Majure is an inclusion consultant that she would agree to have retained to work on her son's program. Indeed, the Parent initially provided this name to the Board. This consultant, who provides recommendations for the Student's program, will need to consider the appropriateness of the mainstream placement and thus consider inclusion as part of their consult.

Given that the Parents have not raised any other procedural issues, the second inquiry is the determination of whether the IEP is reasonably calculated to enable the child to receive educational benefits. The Parents argue that the IEPs were not reasonably calculated to provide educational benefit and thus do not meet the substantive requirement of the IDEA. The Parents put forth several arguments to support their claims that the IEPs failed to provide a FAPE. It is important to note from the outset that the Individuals with Disabilities Education Act (IDEA) does not itself articulate any *specific* level of educational benefits that must be provided through an IEP. The Supreme Court however, has specifically rejected the contention that the "appropriate education" mandated by IDEA requires states to "maximize the potential of handicapped children." *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2nd Cir. 1998), citing *Rowley, supra*. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* The goal of IDEA is not to maximize a special education child's potential, but rather to provide access to public education for such

children. *K.P. v. Juzwic*, 891 F.Supp. 703, 718 (D.Conn. 1995). Throughout the hearing the Parents contended that the bar was not set high enough for the Student and that the IEPs failed to envision sufficient progress for their son. The Court in *Rowley* pointed out, however, that the intent behind the IDEA was not to equalize educational opportunity, but to assure that every handicapped or disabled child has access to public education that will provide a benefit. *Rowley*, 458 U.S. at 198-200. “The annual goals in the IEP are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve-month period in the child’s special education program.” 34 C.F.R. Sec. 300.34, App.C, No. 38. Testimony in the record from all Board witnesses indicates that the goals and objectives included in the IEPs were appropriate and aimed at providing the Student with educational benefit. Indeed, the Parent did not make any specific requests to change the IEP goals and objectives during any of the school years at issue.⁵

The appropriate standard is whether the Student can derive meaningful educational benefit from the proposed program, not everything that might be thought desirable by loving parents. *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2nd Cir. 1989) While the Parents have been active participants in the Student’s educational program and appear to truly want to maximize his educational experience, that is not the appropriate standard. The Board exercised appropriate discretion in formulating and implementing the Student’s IEP for the 2005-2006 school year.

⁵ The Parents have stressed that they do not want a functional approach to the Student’s education. In their brief, however, they claim that the Board failed to address their concern for a toilet training program for the Student. If the Parents now want this goal added to the Student’s IEP, the PPT should convene to address this issue. It is noted, however, that removal from the classroom to work on this goal will necessitate additional time out of the regular education classroom, resulting in a decrease in the percentage of inclusion time.

The program proposed by the Board for the 2005-2006 is appropriate for the Student, considers his strengths and weaknesses, is developed so that the Student can derive meaningful educational benefit, and will be delivered in the least restrictive environment. Some of the related services must be provided outside of the classroom, for focus, attention and appropriate delivery of the services. The inclusion consultant stressed that the literacy program must be delivered as a pull out service. The Student's 2005-2006 program was individually designed after careful review of all evaluations to place the Student in regular classes with supplementary aids and services, adjusted curriculum classes, and appropriate modifications, accommodations and related services.

IV. Board's request for psychiatric evaluation

The remaining issue for the Board is whether the Parents' lack of consent to the psychiatric evaluation shall be overridden. Evaluations are completed to determine if the student has a disability, to gather information regarding the student's individual educational needs, to include information needed to design the services and supports the student will need to learn in the general curriculum and regular education classes and to help determine effective strategies for meeting those needs. 34 C.F.R. Sec. 300.

532(b)(d) The Board, however, has not provided an appropriate reason that it requires the psychiatric evaluation. Therefore, the Parents' lack of consent is not overridden. This does not preclude the Parents from agreeing to such an evaluation at Board expense at a later date.

V. Compensatory Education

The Parents are seeking an award of compensatory education for the time that the Student was not provided an appropriate program. The Student is entitled to

compensatory education for the Board's failure to provide an appropriate program in its failure to provide an appropriate functional behavioral assessment, behavioral intervention program, and carefully reviewed and analyzed reason for removal of the Student from the regular classroom during the 2004-2005 school year.

Appropriate relief is the relief designed to ensure that the Student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District no. 3*, 31 F. 3d 1489 (9th Cir. 1994)

"Relief designed to cure deprivations under 20 U.S.C. § 1412(2)(B) must accord with congressional intent. See *Burlington*, 471 U.S. at 370-371, 105 S. Ct. at 2003. In *Burlington*, the Supreme Court held that tuition reimbursement constitutes appropriate relief under the EHA because it "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-371, 105 S. Ct. at 2003. Furthermore, tuition reimbursement addresses "[a] child's right to a free appropriate public education," and *satisfies the congressional intent to provide relief which remedies the deprivation of that right*. *Burlington*, 471 U.S. at 370, 105 S. Ct. at 2003, (emphasis in original). *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) extended this rationale to compensatory education, adding that the School District "should [not] escape liability for [educational] services simply because [the parent] was unable to provide them in the first instance. . . . We are confident that Congress did not intend the child's entitlement to a free education to turn upon her parent's ability to 'front' its costs." *Miener*, 800 F.2d at 753. The *Miener*

court reasoned that compensatory education, like tuition reimbursement, cures the deprivation of a handicapped child's statutory rights, thus providing a remedy which Congress intended to make available. 800 F.2d at 753; accord *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), vacated and remanded on other grounds sub nom. *Sobol v. Burr*, ___ U.S. ___, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1298 (1990) ("We do not believe that Congress intended to provide a right without a remedy"); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (both remedies necessary "to preserve a handicapped child's right to a free education.") *Miener* also noted that compensatory education satisfies Congress' intent to channel available resources to programs benefiting the handicapped. 800 F.2d at 753, citing *Smith v. Robinson*, 468 U.S. 992, 1020, 104 S. Ct. 3457, 3474, quoting 121 Cong.Rec. 19501 (1975)" *Lester H. v. Thomas Gillhood*, 916 F. 2d 865 (3rd Cir. 1990)

The Parent is entitled to compensatory education for the inappropriateness of the 2004-2005 school year program, and the Board's failure to place the Student in regular education only when he could not be educated satisfactorily in regular classes with supplementary aids, services and modifications to the general curriculum, for the 2004-2005 school year. The Board shall retain an inclusion consultant who has considerable experience in placing children with mental retardation in regular classes. It is not found that Dr. Whitbread would be an appropriate consultant at this point, in light of the testimony presented in this case. This consultant retained shall be an inclusion consultant

who also has extensive background in behavioral assessment and intervention plans. An appropriate consultant would include Ann Majure, or another similarly situated consultant who has experience in both inclusion and behavioral assessments and intervention plans. The Parents shall assess availability of consultants and identify an inclusion consultant who also has an extensive behavioral background who can provide the necessary support to the team.

FINAL DECISION AND ORDER:

1. The Board's program for the Student for the 2004-2005 school year was not appropriate.
2. The Board's proposed program for the Student for the 2005-2006 school year is appropriate.
3. During the 2004-2005 school year the Board did not place the Student in regular classes and remove him from that environment only when he could not be educated satisfactorily in regular classes with supplementary aids and supports and modifications to the general curriculum as required by 20 U.S.C. Sec. 1412(a)(5)(A)
4. For the 2005-2006 school year, the Board did consider placing the Student in regular classes and removing him only when he cannot be educated satisfactorily in regular classes with supplementary aids and services and modifications to the curriculum as required by 20 U.S.C. Sec. 1412(a)(5)(A).
5. The Board shall provide the Student with an inclusion consultant for one calendar year as compensatory education. The Board shall authorize the consultant to make the observations of the program as needed, train the teaching and paraprofessional staff, review documents and data, consult with the team to develop and implement an appropriate IEP, attend planning meetings, participate in the completion of a functional behavioral assessment, and consult with the family as needed.
6. The lack of parental consent to the psychiatric evaluation is not overridden.