

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on Behalf of the Parents: Courtney P. Spencer, Esq.
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Appearing on Behalf of the Board: Michelle C. Laubin, Esq.
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Appearing Before: Attorney Justino Rosado, Hearing Officer

FINAL ORDER AND DECISION

ISSUES:

1. Did the Board's program for the 2005-2006 school year provide the student with a free appropriate public education (FAPE) as required in 20 U.S.C. §1401 et seq?
2. If not, does the program and placement at St. Catherine Academy in Bridgeport, Connecticut, provide the student with an appropriate program?
3. Did the 2005 summer program offered by the Board provide the student with FAPE?
4. Is the Board financially responsible for the program and placement at St. Catherine Academy for the 2005 summer and the 2005-2006 school year?
5. Is the Board responsible for funding private occupational, physical and speech therapy services for the 2005-2006 school year?

PROCEDURAL HISTORY:

On or about July 12, 2005, the Parents through their attorney requested a Due Process hearing rejecting the Individualized Education Program offered at the June 7, 2005 PPT meeting to the student for the 2005-2006 school year. The Parents requested an out of district placement at Saint Catherine's School in Bridgeport, Connecticut at the Board's expense. The Board rejected the Parents' request and the Parents requested a due process hearing.

On or about July 12, 2005 the Board received notice of the Parents' request for due process and on July 12, 2005 an impartial hearing officer was assigned to hear the matter. A pre-hearing

telephonic conference was held on August 8, 2005 and hearing dates of August 26, 29 & 30, 2005 were chosen by the parties. Additional hearing dates were required and all parties agreed to October 5, 14, 17, 18, 21, 26, and 28, 2005.

The Parents submitted 15 exhibits and the Board presented 325 exhibits. The Board objected to Parents' Exhibit 8 and presented a Motion in Limine to exclude the exhibit. The Parents' attorney filed a timely objection. The Board's Motion In Limine was denied.

The Board's Exhibit # 306 originally was a 25 page exhibit; the Board withdrew the exhibit and replaced it with a 544 page exhibit. The Hearing Officer only allowed the Exhibit to be marked for Identification and any part of the exhibit needed to be brought in through a witness. At the end of the hearing the exact page total of the exhibit would be marked as a full exhibit. The Board objected and the objection was denied. The Board's exhibits 1-148 were marked only for identification; the exhibits cover the student's educational history from 1995 to November 2002. The current hearing only involves the student's 2005-2006 school year and the summer of 2005. If an exhibit from 1-148 was needed during the course of the hearing, it would be made a full exhibit thorough a witness. The Board objected to this ruling and the objection was denied.

The Final Decision and Order date was extended to accommodate the additional hearing dates and the filing of post hearing briefs and the final decision.

The date for the Final Decision and Order is January 4, 2006.

SUMMARY:

The student is a 13 year old boy who has been diagnosed with multiple medical disabilities, gastroesophageal reflux, cranial syntosis, tracheomolacai, nystagmus, left ear hearing impairment, mental retardation, latex allergy, velocranial facial syndrome, rocker feet, no peripheral vision in his left eye, deteriorating vision, significant speech production delays, significant hypotonia, 22q11 deletion, asthma and cystic fibrosis. The student is eligible to receive special education and related services as stated in the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§1401 et seq. and Connecticut General Statute §10-76a. under the category of Other Health Impaired (OHI"). The Parents objected to the 2005-2006 IEP proposed by the Board and requested that the student be placed in Saint Catherine's School. The Board denied the Parents' request.

In June 2005, the IEP team proposed a special education program for the student which was agreed to by the Parents with the exception of the placement. The Parents are requesting placement at a private special education school . The placement requested by the Parents is not the LRE for the student. The program and placement offered by the Board is appropriate.

This Final Decision and Order sets forth the Hearing Officer's summary, procedural history, findings of fact and conclusions of law. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. For reference, *see SAS Institute Inc. v. S. & H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D.Tenn. 1985) and *Bonnie Ann F. v. Callallen Independent School Board*, 835 F.Supp. 340 (S.D.Tex. 1993).

FINDINGS OF FACTS:

1. The student is a 13 year old boy who has been diagnosed with multiple medical disabilities, gastroesophageal reflux, cranial syntosis, tracheomolacai, nystagmus, left ear hearing impairment, mental retardation, latex allergy, velocranial facial syndrome, rocker feet, no peripheral vision in his left eye, deteriorating vision, significant speech production delays, significant hypotonia, 22q11 deletion, asthma and cystic fibrosis. The student is eligible to receive special education and related services as stated in the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§1401 et seq. and Connecticut General Statute §10-76a. under the category of Other Health Impaired (OHI"). (Board's Exhibit¹ #292, Parents' Exhibit² #8, Testimony of Pulmonologist).
2. Due to his poor health, the student received services through Birth to Three and subsequently received in home speech and language services through Fairfield Public Schools. The student was placed by the Board at Foundation School from the summer of 1998 through January 2001. The student's pulmonologist limited the student to 4 ½ hours of class each day at the Foundation School. (B-5, B-50, B-52, Testimony of Mother).
3. The Parents requested the student be placed at Jennings School, the Board's grammar school. In January 2001, the Board accommodated the Parents' and the student was placed at Jennings school in a self contained program. At Jennings, the student's classes were essentially all on one floor. The student had access to non-disabled peers and was provided with a summer program. The student did not receive the summer program as proposed. (Testimony of Special Education Coordinator, Testimony of Mother)
4. In a November 2001 PPT, the PPT team noted that the student had missed 12 occupational therapy sessions due to illness. The Team proposed that these sessions should be rescheduled and provided to the student. (B-104)
5. At the November 2001 PPT, the school psychologist requested that cognitive evaluations be performed of the student. The Parents agreed to the evaluations but later rescinded their permission in order to have the evaluations performed by Doctor Dorothy Stubbe. This evaluation took one year to complete because it had to be done in sections. The evaluator had a 3 year waiting list and could not do the evaluations any sooner. When the evaluation was completed, it was not shared with the Board. The Board offered to have a neuro-psychological evaluation done by an independent evaluator at the Board's expense. This was not done because the student had surgery and was not able to attend the sessions. (B-105, B-106, B-111, B-168, Testimony of Mother)

¹ Hereafter, "B" will designate that it is a Board Exhibit.

² Hereafter "P" will designate that it is a Parent Exhibit.

6. While at the Jennings School, the Parents were concerned with the student's transitioning through the larger building and learning in an inclusion environment. At a PPT meeting in December 1, 2003, the Parent requested that the student be placed at St. Catherine's School for the remainder of the 2003-2004 school year. The mother provided a letter from the student's doctors supporting a smaller environment due to his failure to make expected progress and the fact that the student was overwhelmed. This request was denied by the PPT. There was no request for a Due Process Hearing. (Testimony of Mother, B-198, B-205)
7. The Parents were of the opinion that a smaller environment was more appropriate for the student although his receptive language had increased greatly over the last year. In earlier years the student was able to make only a few sounds, now he had improved to the point where he could articulate 3 syllable words. The student had been using the Macaw augmented communication device, but now communication boards were being introduced as a communication tool. At the December 2003 PPT the Parent requested an Edmark reading program to be utilized. The PPT stated that the program was not appropriate for the student. (Testimony of Mother, B-153, B-218)
8. Due to the student's disabilities, he requires an air conditioned environment to avoid any life threatening situation. The student was not being provided with this accommodation and in May 2004, the Parents filed a complaint with the State Department of Education. The Board rectified the situation and provided the student with an air conditioned environment. The cafeteria at the neighborhood school, where the student eats lunch, is currently not air conditioned. To accommodate the student, the class room that the student will attend in the 2005-2006 school year is being equipped with air conditioning. (Testimony of Mother, B-241, B-243, B-255, Testimony of Special education Coordinator, B-299)
9. During the 2003-2004 school year the student missed a total of 38 days of school due to illness. Neither the services nor the school days were made up. The Parent did not request homebound services nor did the Board offered the Parent to reschedule the services or provide a tutor. The Parents thought that because homebound was not on the student's IEP, they could not request it. (Testimony of Mother, Testimony of Special Education Teacher)
10. The summer program for the summer of 2003 was not provided as stated in the IEP. The student only received 10 hours of tutoring and not all the speech and language sessions. The Board offered to make up the sessions during the 2003-2004 school year, but after the school day. By December 2003, the student had made up all of the summer sessions except 2.75 hours of speech/PT. (Testimony of Mother, B-214)
11. In the spring of 2003, a psychological evaluation was performed of the student. This evaluation was not shared with the PPT. (B-164, B-170)
12. At the November 2004 PPT meeting, the Parents informed the team that they would obtain a Mercury dynamic display communication device for the student to use in

school and at home. The device was purchased by the Parent in May 2004. The Parents did not want the Board to purchase the device because they were under the impression that if the Board purchased the device, the student would not be allowed to take the device home because the device was fragile. The device was not utilized in the school because the Parent did not make it available to the Board. When the device was brought to the school to be evaluated by the Board, the Parent dropped it and it broke. The special education teacher felt that the Mercury device was too complicated for the student. The Go Talk 4 device the student was utilizing only contained 4 pictures and the student found it difficult to use. The Mercury device utilized 30 pictures and it would be more difficult. (Testimony of mother, Testimony Special Education Teacher)

13. The program offered the student at Jennings School was being changed and a transition plan was prepared to bring the student to his neighborhood school. The Parent and the student's doctor were of the opinion that a long transition was not in the student's best interest. In January 2004 the student was transitioned from the Jennings School to his neighborhood school. The Parents did not dispute goals and objectives offered the student at the new school. The student started at the neighborhood school on 1/5/04. The student did well with the transition and the Parents were happy with the transition. (Testimony of Mother)
14. The neighborhood school is a larger school than Jennings, with more floors and more children. The Parent did not object to the transfer because of the size of the building. After his transition to the neighborhood school in January of 2004, the student missed approximately three weeks of school in less than six months due to illness. He was not provided homebound tutoring or makeup related service hours for this missed time. (Testimony of Special Education Coordinator, B-236)
15. During the 2003-2004 school year the student missed a total of 15 school days. His absence after the transfer to the neighborhood school was for one period of 9 days due to illness. Health issues cause the student to miss school days. (B-236, B-252, P-7)
16. The Parent complained that the student had been exposed to latex various times while at the neighborhood school. The student's high allergy to latex had been explained to the staff and a proactive effort had been made to remove latex from the student's school environment. Pencils used in the student's classroom were checked to insure that the erasers did not contain latex. An individual health care plan was put in place in September 2004 in which the student's health issues including allergies were addressed. This plan had been sent home by the school nurse for Parent's review, but received no response from parent. (Testimony of Mother, Testimony of School Nurse)
17. At a baby shower that occurred in the school before class, the student was exposed to latex. The Parent was present during the baby shower and provided medication for the child in case there was a reaction. The Parent and child remained in the party and

later in the school day the nurse, in response to the Parent, checked the student for any reaction. The student showed no signs of an allergic reaction. This event occurred in February 2005. The Parents alleged that the student in January 2005, had been exposed to latex. The school nurse and student's special education teacher stated that they had not noticed any reaction of the student and that the event did not occur. (Testimony of School Nurse, B-282)

18. During the 2003-2004 school year, the student made progress in his physical therapy. The student was able to descend stairs without assistance. The number of stairs is fatiguing but his trips are not so fatiguing because they are scattered throughout the day. The student also made progress in his fine motor skills. (B-232, B-231)
19. The Edmark reading program was utilized by the student when he was transferred to his neighborhood school. This was the program the Parents had requested at the December 2003 PPT and had been denied by the Board. This program assists the student in his visual discriminatory skills. A word would appear on the screen and the student would call up three other words. He then has to select the word that was the same as the first word. Sign language was incorporated into the Edmark program. The student would learn the sign for a word. He then is able to identify the word using the Edmark. At the end of the student's 2003-2004 school year, he was able to identify, read and sign 5 words.(B-223, Testimony of Special Education Teacher)
20. The current speech therapist started working with the student in the spring of 2004, at the beginning of his transfer, the speech and language pathologist from Jennings School came to work with the student at the neighborhood school. The student at the time was using the Go Talk 4 assistive technology device. This device is a voice output device containing 4 large quadrants for picture placement. It has 4 levels of memory to record words/phrases or sentences for the student to use. The student was only using two levels of this device and his current speech therapist has worked with him using all levels. (Testimony of Speech and Language Pathologist)
21. At the May 4, 2004 PPT the team recommended 1 hour per week of occupational therapy, ½ hour per week of physical therapy, 5 hours per week of speech and language therapy and ½ hour per week of specialized gym. The student continued to receive one-on-one para-professional and an extended school year. The purpose of the ESY was to insure that the student's skill levels are maintained and that the student can return the following school year at the same level.(B-234, Testimony of Special Education Coordinator)
22. At an October 2004 PPT meeting the Parents advised the team that they were under the impression that chest percussion therapy was performed on the student without consulting the Parents or advice from the student's pulmonologist. The physical therapist stated that this was not performed but a technique called respiratory pumping was utilized. This is a process where the student's feet are rocked back and forth while the student is lying on a mat. The purpose of this technique is to assist the student in coughing up mucus. Chest physiotherapy can be done to student and is done to other students by a person who has been trained in the procedure. The Board

requested that the student's pulmonologist recommend the proper procedure for the student. (Testimony of Physical Therapist, Testimony of Pulmonologist, B-268)

23. The Parent at this October 2004 PPT was of the opinion that the student's academic program and speech progress were going well. The Mother was happy with the student's 4th grade special education teacher. The Mother found her supportive and child centered. The student worked well with the teacher and had a very good student teacher relationship with her. (B-269, B-306 pg 248)
24. In March 2004 the Parents were concerned about the student's program because his speech and language pathologist was being changed. This issue was resolved and the Parents were satisfied. (Testimony of Mother, B-225, B-226)
25. On June 7, 2005 a PPT was held to discuss the student's 2005-2006 IEP. The Parents did not disagree with the student's goals and objectives. They felt the goals and objectives and proposed service hours were appropriate. The Parents did not disagree with the ESY. The Parents did not agree with the proposed placement at the neighborhood school. (Testimony of Mother, B-299)
26. The Mother complained to the Board that the student soiled his pants on a few occasions. The school nurse updated the student's health plan and provided the student with a toileting plan. (Testimony of Mother, B-306 pgs. 4, 270, 279, B-324, Testimony of School Nurse)
27. The Parents were concerned with the student's movement around the school. They felt that with reference to his current school schedule, he has a half an hour in one place, and then has to move and that this would be pretty overwhelming to any child, especially a child with the student's disabilities. She testified that there is a difference between walking for exercise purposes and having to walk to access his educational classes. The student's physical therapist had observed the student moving about the school and was not concerned. The student was proficient in a familiar environment and has to be told to slow down when going up and down stairs. The student's IEP does not require him to perform this safely. Parents restricted the use of stairs for the student and the school staff followed the suggestions. (Testimony of Mother, Testimony of Physical Therapist)
28. The program support teacher, who conducted the September 2005 assistive technology evaluation, is on the assistive technology team at the neighborhood school. The teacher testified that she did not recommend an assistive technology evaluation sooner, despite attending numerous PPT's for the student, because she felt that was the obligation of the speech and language pathologist. She has never worked directly with the student outside of the two evaluations she conducted. She claimed in her testimony that the Dyna Vox which has been proposed for the 2005-2006 school year was not introduced earlier because the student was not ready to utilize such a device. She testified that the Dyna Vox would require the student to simply press a button on a screen to either use the voice output device or change to a different screen

and the GoTalk 9 required the student to manually remove screens to access the different options. (Testimony of the Program Support Teacher for Special Education)

29. During the 2004-2005 school year, the student had three different occupational therapists, as his assigned therapist went on maternity leave. The special education teacher also went on maternity leave, so the student had a substitute special education teacher. He additionally had three different paras and two different gym teachers during the 2004-2005 school year. (Testimony of Special Education Teacher, Testimony of Mother).
30. The student mastered nine out of forty eight objectives during the 2003-2004 school year. During the 2004-05 school year, he mastered eleven out of forty-six objectives and did not master any academic/cognitive objective. (B-312, B-318).
31. The student can only say between 50 and 60% of the 35 Edmark words he was reported to be able to read. Since the Student can only read words in the Edmark program, he would not be able to read a kindergarten level book unless it contained the words he has worked on. The student has not mastered the ability to answer yes/no questions after listening to a story of between ten and twenty words, a skill he has been working on since the 2001-02 school year. (Testimony of Special Education Teacher).
32. The student's psychiatrist is a board certified child and adolescent psychiatrist who is an associate professor and Director of Residency Training at the Yale University Child Study Center. She conducted a developmental evaluation of the student during May of 1998, paid for by the family. In June of 2003, the Parents funded another evaluation by the psychiatrist which involved a school observation at Jennings. She found his self contained, highly structured program with five other students, to be appropriate. She recommended increasing his life skills curriculum. In November of 2003, the psychiatrist conducted another evaluation to assess progress and the student's program, including an observation. She recommended a class of no more than eight children, with a quiet room with minimal distractions, working at his developmental level. In May of 2005, the psychiatrist conducted another evaluation of the student, funded by the family, which included a school observation, review of the IEP and the annual reviews by the special education teacher, occupational therapist, physical therapist and the classroom teacher and a telephone consultation with the pulmonologist. The psychiatrist testified that she was concerned that the student had regressed in many areas from her previous evaluation (B-44, B-168, B-201, B-292, P-13 & Testimony of Child and Adolescent Psychiatrist).
33. She recommended a self contained classroom with no more than eight children with two teachers, that the staff should be trained to handle the student's cognitive and health needs, that he have a total communication approach, that his program should be highly structured and minimally stimulating with a focus on functional life skills. She stated that he continues to require a one-on-one para unless he is placed in a supportive, small self contained environment. Time with regular education peers

should be very time-limited and structured. She recommended occupational therapy for two hours per week and physical therapy for one hour per week, intensive speech and language services, work on the computer and recommended that a life skills curriculum should be fully integrated into the student's academic programming and IEP. The psychiatrist testified that it is not appropriate to place the student in mainstream classes, and that he be educated with similar functioning peers. In explaining her reason for this recommendation, she pointed out that he gets overwhelmed extremely easily, that his receptive language and ability to process auditory information and his ability to understand things quickly is impaired. She was significantly concerned about the increase in his anxiety, which appeared to be related to stress. (Testimony of Child and Adolescent Psychiatrist).

34. Special education coordinator testified that the district relied on the psychiatrist's evaluations of the Student, although they disagreed with her recommendation for outplacement. (Testimony of Special Education Coordinator)
35. Through out the 2004-2005 school year the student has continued to make progress in the area of his speech and language. The student has progressed from following two step motor commands to 2 step academic directions. The student has made progress in his use of augmentative communication devices. He is now scheduled to go from a Go Talk 9 to a Dyna Vox Augmentative communication device. This utilizes a multi menu that will allow the student to go through layered pages designed for different activities and communication choices. (Testimony of Speech and Language Pathologist)
36. The recommendations of the student's doctor are entirely consistent with the program being offered to the student with the exception of an out of district placement. (Testimony of Special Education Teacher and Speech and Language pathologist. (B-292, B-299))
37. Sister Marilyn Muldoon is the Chief Administrator of St. Catherine Academy. The curriculum of St. Catherine Academy, including the functional life skills component, is calculated to help students become independent by the time they become adults and avoid complete dependence on other adults. St. Catherine Academy provides speech and language, physical and occupational therapy services through Rehab Associates. The entire school is air conditioned, located on one floor and the classrooms have minimal distractions. The student would remain in one classroom except for lunch, recess, art, and music. There is a place for him to rest if he becomes fatigued. St. Catherine Academy provides a three week summer program which continues the work contained in their IEP's with an addition of increased recreation activities and can be supplemented with additional time through a sending district. The student's access to non-disabled peers is through physical education classes in a school in another district and swimming at the Sheehan Center in Bridgeport. The Parents were agreeable to the swimming classes. Student has been accepted in St. Catherine's school and there is an opening for him. (Testimony of St Catherine's Administrator)

38. There are 13 children in the school divided into 3 classrooms. Student grouping based on student developmental level rather than age. The ages of the students in the classroom the Parents proposed are 7-12 years of age. There are children in that class who are verbal. One of the classrooms is for lower functioning children and it is a more one-on-one classroom. The third classroom is for students who are more skilled, able to read at a higher level than the student and their social skills are better than the student. The school has a school nurse who comes once a week. The nurse reviews record and trains staff. There are no medically fragile students in the school. If the student is out sick, St. Catherine's does not provide home tutoring. (Testimony of St Catherine's Administrator)
39. The Board offered to provide a room for the student to rest, receive medication and use a therapy vest that helps the student expel mucous. (B-299)
40. In May 2005 the Parents obtained a neuropsychological evaluation of the student. In the evaluation, the evaluator tested the student and found that the student had an intelligent quotient of 62. This is in the deficiency range. The evaluator could not complete all the test of the student because of his IQ. The evaluator did not review the student's IEP but his report offered the following recommendations for the student's educational program:
- a. Facilitated communication programs should be introduced such as the Dyna Vox or MACAW3.
 - b. Speech and Language therapy should be continued with a respiratory therapy program.
 - c. Continued OT and PT services
 - d. Maintain as much continuity will help with the student's transitions and minimize the number of distractions.
 - e. Home based instruction for extended absences.
 - f. Focus on pragmatic skills, teach the student the value of money and recognize basic signs.
 - g. A full time aide to assist the student to stay on task, make transitions and assist him in his basic educational and recreational program. (P-8)

CONCLUSIONS OF LAW:

1. There is no dispute that the student is eligible to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) pursuant to IDEA, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, and Connecticut General Statute, Section 10-76d(a)(1).
2. The Board has the burden of demonstrating by a preponderance of the evidence that it has complied with the requirements of IDEA, Regulations of Connecticut State Agencies ("Regulations"), Section, 10-76h-14.

3. IDEA represents "an ambitious federal effort to promote the education of handicapped children." *Board of Educ. v. Rowley*, 458 U.S. 176, 179, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). Because the statute expresses that disabled children should be educated alongside non-disabled peers "to the maximum extent appropriate," special education services must be provided in the least restrictive environment consistent with the child's educational plan. Only when "'the nature or severity' of a child's disability is such 'that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily' should a child be segregated." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998) (*quoting* 20 U.S.C. § 1412(5)). In order to ensure that the balance of services required to meet these goals is specifically fitted to the particular child, the IDEA requires that each child receive an individualized education program. The IEP is intended to be "the result of collaborations between parents, educators, and representatives of the school district." *Lillbask v. Connecticut Dep't. of Educ.*, 397 F.3d 77, 2005 U.S. App. (2d Cir. Feb. 2, 2005). 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." *Walczak*, 142 F.3d at 130.

4. The Supreme Court in *Rowley* identified a two part test for determining whether an LEA such as the Board has provided FAPE. The first inquiry is whether the LEA has complied with the procedural requirements of the IDEA, particularly those pertaining to the development of the IEP. The second inquiry is whether the IEP proposed by the LEA at issue is "reasonably calculated" to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-207.

5. The inquiry as to the first prong of the *Rowley* standard, 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." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990), *cert.denied*, 499 U.S. 912 (1991).

6. The Parents presented extensive testimony alleging procedural violations

- a. where the student did not master close to thirty percent of his goals and objectives for the 2003-04 and 2004-05 school years, yet no PPT was called to modify these goals and objectives.
- b. There is no indication of the student's present levels of education.
- c. Failure to appropriately evaluate the student.
- d. The failure of the district to have accurate baseline data.
- e. The Parents argue that the student has not had a consistent summer program. The student's illness has limited his participation in the summer program. The times missed, at the Parents' request, the Board has attempted to make up.

7. The Parents present these violations as a failure for the Board to present the student with FAPE. The Parents have been extensively involved in the student's program. The Board has taken into consideration the Parents' request and has respected and incorporated their as well as the student's doctors' recommendations. (Findings of Facts 3, 13, 16 & 24). The student's doctor requested that the student's educational program be shortened to 4 ½ hours each day. The Board reduced the student's program. The parent requested that the student use the elevator more often. The Board complied. The Parents have, at the PPT's, agreed with the program being offered. (Findings of Facts 23 & 25) The Board attempted to have a neuropsychological evaluation of the student in 2003. The student's medical condition impeded this evaluation from going forward. Perhaps the Board should have been more insistent but the Parents decided to have their own evaluators evaluate the student. These evaluations were not always offered to the Board in a timely manner. Whether the Board's program for 2003-2004 and 2004-2005 school years was appropriate and if the Board committed procedural violations that constituted a denial of FAPE to the student is not an issue of the current due process hearing. The only school year and IEP at issue is the 2005-2006 IEP and I do not find any procedural violations committed by the Board for 2005-2006 school year, that would deny the student FAPE.

8. The second inquiry is the determination of whether the IEP is reasonably calculated to enable the student to receive educational benefits. A review of the IEPs for 2003-2004 show that although the student has not mastered all his objective and goals, the PPT team had reviewed and modified the goals and objective and had not maintained the same objective through those school years. The student will be utilizing the Dyna Vox assistive communication device during the 2005-2006 school year as was recommended by the student's neuropsychological evaluation. (Findings of Facts # 40) Although the PPT team did not have the neuropsychological evaluation when the 2005-2006 IEP was created, many of the doctors' recommendations are part of the student's IEP. (B-299, P-8) The Mother testified that the goals and objectives provided to the student for the 2005-2006 school year are appropriate. (Findings of Facts #25).

9. I agree with the Parents' assessment that the goals and objectives for the 2005-2006 school year are appropriate. Appropriateness of the goals and objectives of an IEP do not in itself signify that the IEP will provide the student with FAPE. IDEA also requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled. *20 U.S.C. Section 1412(a)5)(A)* School districts must evaluate whether a student can be educated in a regular classroom if provided with supplemental aids and services, and a full range of services must be considered. *Oberti v. Board of Education*, 995 F.2d 1204, 1216 (3d Cir. 1993). The district must examine the educational benefits, both academic and nonacademic, to the student in a regular classroom. Among the factors to be considered are the advantages from modeling the behavior and language of non-disabled students, effects of such inclusion on the other students in the class and the costs of necessary supplemental services. "Least restrictive environment" is defined as follows under IDEA:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are

not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that such education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.*

10. The Fifth Circuit established a two-part test to determine when mainstreaming is appropriate. First, a student should only be removed from the mainstream "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." 34 C.F.R. § 300.550(b)(2); *Daniel R.R. v. State Board of Educ.*, 874 F.2d, 1036, 1048 (5th Cir. 1989). Second, if placement outside of regular education is necessary for the child to benefit educationally, the PPT must also determine "whether the school has mainstreamed the child to the maximum extent appropriate." *Daniel R.R.*, 874 F.2d at 1048. The evidence presented does not show that the student cannot be educated in the mainstream environment.

11. Under the *Daniel R.R.* test, which has been followed by courts in the Second Circuit, "the appropriate yardstick is whether [the student], with appropriate supplemental aids and services, can make progress towards her IEP goals in the regular classroom setting." *A.S. v. Norwalk Bd. of Educ.*, 183 F.Supp.2d 534, 546 (D. Conn. 2002). When determining the appropriateness of a given placement, courts will also consider evidence of a student's progress in that placement. There has been testimony that the student has progressed in his placement at the neighborhood school. The Parents agreeing with the appropriateness of the IEP goals and objectives which are written to provide the student a "meaningful education". The goals are written to meet the unique needs of the student and take into consideration his fragile medical condition. The Parents greatest concern is that the student could have a medical episode in school which could aggravate his medical condition. It seems to me that this is also the Board's concern. The Board is looking for guidance from the student's doctors to provide him with not only an educational program to allow the student not only to progress but also be in a safe environment that will meet his unique needs. Educating the student in a Saint Catherine's does not mean that the student's environment will be safe. There was no testimony that showed that the student's absences were due to his placement at the Board's school or being in contact with his peers whether disabled or non-disabled. The student's involvement in the mainstream program is limited to 5 hours each week. Neither the pulmonologist nor the evaluation of May 2005 recommends that it would be more appropriate for the student to be in a more restrictive environment in order to receive his education. The Board has shown a willingness to modify the student's IEP and make accommodations to ensure that the student receives FAPE in the least restrictive environment. Lastly, there has been no evidence that the student's involvement in the mainstream setting is disruptive and affects the ability of his non-disabled peers obtaining a proper education. *Oberti*, 995 F.2d at 1218. The Parents' concern for their child is noteworthy and I would expect nothing less from such carrying parents, but Saint Catherine's would be a more restrictive environment for this student and would be a denial of FAPE.

FINAL DECISION AND ORDER:

1. The program offered by the Board for the summer of 2005 and the 2005-2006 school year is appropriate will provide the student with FAPE.
2. Since the program offered by the Board is appropriate the other issues are moot.
3. The Board shall facilitate a telephonic conference with the student's pulmonologist to ensure appropriate accommodations for the student.