

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Appearing on behalf of the Student: Attorney Robert Skelley
Innovative Legal Minds, L.L.C.
952 North Main Street
Danielson, CT 06239

Appearing on behalf of the Board of Education: Attorney Anne Littlefield
Shipman & Goodwin, L.L.P.
One Constitution Plaza
Hartford, CT 06103

Appearing before: Attorney Deborah R. Kearns, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

- I. Whether the local educational agency failed to meet its obligations pursuant to Child Find in February 2004?
- II. Whether the local education agency provided the child a free and appropriate public education for the 2005-2006 school year?
- III. If the IEP provided by the local educational agency for 2005-2006 school year was not appropriate, was the parent's unilateral placement at the Rectory School appropriate?
- IV. Whether the child is entitled to compensatory education services?

PROCEDURE

The parent moved to include issues for hearing beyond the scope of the two year statute of limitation claiming they had not received the copies of the procedural safeguards when the child was exited from special education in 1999. The parties submitted testimony and evidence and the request to extend the statute of limitation was denied. The parties agreed to submit a joint statement as follows (HO-1)

- (1) Whether the Board's failure to address the Owens' ADD results in February 2004, constituted a failure to meet the Child Find requirements and consequently, a denial of FAPE?
- (2) Whether the Board provided the student a free and appropriate public education (FAPE) the 2005-2006 school year?

- (3) If not, whether the parent's placement of the student at the Rectory School is appropriate?
- (4) If so, is the Board responsible for the cost of that placement?
- (5) If the Board is found to have denied the Student a FAPE, is the Student entitled to compensatory education services?

The parent's request for the hearing be open to the public was granted, with the condition that guests enter the hearing prior to the start of testimony or a hearing session and remain seated until the hearing comes to a recess. The hearing convened on 12 days. The dates of hearing were selected to accommodate the needs of both parties to present their witnesses and have an opportunity for cross examination. The parent moved to consolidate the claim for due process for the 2006-2007 school after all the evidence and testimony had concluded. It was understood no additional testimony would be required. Initially there was agreement to consolidate the motion with conditions related to the law and regulations applicable to the new case. Ultimately the parties did not agree and the request to consolidate was denied. The parties had a post hearing briefing scheduled that included reply briefs. The record closed March 21, 2007. The date for final decision in the matter is April 13, 2007.

FINDINGS OF FACT

1. The child was first identified as a child with speech and language delays in need of special education at age three. He received speech and language services as a preschooler from January 1997 to June 1999. An IEP team reviewed the report of the speech and language therapist on June 15, 1999 and exited the child from special education. The parents did not dispute the evaluation or the child's exit from special education. From June 1999 to June 2005 the child attended the local educational agency schools as a regular education student. (P-6, P-16, P-18, P-19, P-20)
2. During the early elementary school years the child's performance was typical. He often had average and above average grades as noted in the hearing record at P-39. The child received occupational therapy services for handwriting ending in 2002. (Exhibit P-39)
3. The mother works for the local educational agency and the parent maintained close communication directly with the child's classroom teachers. (Exhibit B-13, Testimony, Mother, Fulco, Foisy)
4. In 2002-2003, the fourth grade teacher and mother discussed the child's inattention in class. The teacher used regular education interventions to help the child stay on task, including preferential seating and tapping on the desk or page of book to refocus the child. All the fourth grade students received assistance reviewing for exams or with organizing materials and assignments. The teacher testified the child was able to master fourth grade material and show improvement in math. (Testimony, Fulco, Mother)

5. In November 2003, the parent requested the child be screened for ADD using the Owen's ADD Rating Scales. The results indicating the child was at risk for ADD were sent to the parents in February 2004. The mother told the Director of Pupil Services and the fourth grade teacher she intended to have the child evaluated for ADD by a professional outside the school system. The parent did not request the school evaluate the child for ADD or any other disability. (Exhibits B-6, P-59, P-63, Testimony, Mother, Father, Fulco, Lustilla)
6. The parent scheduled an appointment to have Dr. Herklots evaluate the child during the summer of 2004. The mother stated the appointment was cancelled due to an undisclosed family crisis. The father later testified he did not want the child evaluated by Dr. Herklots and chose to pursue another evaluation. The mother testified the child made gains in school, during the fourth grade, and the mother hoped the problems had gone away. An e-mail communication to the fifth grade teacher states the appointment with Dr. Herklots was canceled due to a conflict, stating it is so easy for me to ignore things and hope they will go away. The parent had the child evaluated at the Connecticut Children's Medical Center. (Testimony, Mother, Father, Lustila, Foisy)
7. The parents testified they did not request the child be identified as a disabled child or a request that the child be evaluated during the child's fourth grade year. The mother worked for the LEA in the same school with the office of the Director of Pupil Services. The parent and the fourth grade teachers collaborated to meet the child's academic needs. Both the mother and fourth grade teacher agreed by the end of the school year the child showed improvement. (Exhibit B-3, B-7, Testimony, Mother, Lustila, Fulco, Foisy)
8. At the time the parents received the Owen's ADD report. The child was performing on grade level and responded well to the classroom interventions to help him focus and be organized. The fourth grade teacher had not made a referral for a child study team (CST) or for an evaluation pursuant to IDEA or Section 504 of the Americans with Disabilities Act (ADA); the teacher did not believe the child required resource room support. (Exhibit B-3, b-7, Testimony, Fulco, Lustila)
9. Throughout the fourth grade year the child's report card had A's B's and C's. The child did not require accommodations to take the Connecticut Mastery Tests administered to all nonexempt Connecticut children. The child performed at goal in reading with scores above the district and school average. The writing score was at goal a little below the district and school average; and the math score was a little below goal but at a proficient level. A proficient score in math demonstrates a mastery of grade level material. Both the parent and the classroom teacher reported they saw improvement in the child. In many informal discussions with the teacher during the fourth grade the parent was satisfied with the child's progress (Exhibit B-3, P-42, P-44, P-59, P-63, Testimony, Foisy, Lustila, Fulco)

10. In fifth grade the parent and teacher discussed the child's difficulty in school at the beginning of the year. When a teacher suspects a child has a disability the teacher refers the child to a child study team (CST) meeting. The team assesses the child's needs. The classroom teachers implement interventions and then report the response to the CST. Two CST meetings convened. The parents testified they were not invited to attend the meetings nor were they notified of the results. The fifth grade teacher was credible when she testified she informed the parent about the meetings and the result. The fifth grade teacher knew the child was being evaluated at the Connecticut Children's Medical Center. (B-9, B-18, P-59,P-63, Testimony, Manning, Foisy, Lustila)
11. At the October 27, 2004, CST meeting the teachers presented the referral forms which described their concerns and the child's response to interventions used prior to the CST. The child's fifth grade teacher was concerned about attention and focus but did not have concerns about grade level performance. The math teacher had concerns about class performance. The action plan provides the child will meet with the psychologist; the special education director was to meet with the fourth grade teacher; the fifth grade teacher was to reduce the amount of homework; and the speech and language pathologist was to conduct a Speech and Language screening. The child's preschool special education identification was for speech and language delay. It was appropriate to suspect a speech and language disability. The math teacher's notation, no improvement is in relation to interventions used before the CST meeting convened. (Exhibit P-45)
12. The December 13, 2004 CST action plan states, as follows: (1) continue to monitor performance (is currently work on grade level); (2) stress staying after class (the child is avoiding this); (3) the psychologist will not be meeting regularly with child (he reports school is going well and he has friends); (4) encourage the use of Alphasmart (the child does not like it). (Exhibit P-48)
13. The fourth grade teacher submitted a report copied to the parent dated December 14, 2004. The teacher states she is not surprised the child is referred to a CST, which states she worked hard to get the child some help [in the fourth grade], but she understood he did not qualify for special education or a 504 identification in the third grade. The fourth grade teacher outlines the child's strengths and weakness and some of the interventions found to be successful. The teacher does not mention social problems. The fourth grade teacher was asked to report to the CST about the same time as the letter P-46 was written while the child was in the fifth grade. The Director of Pupil Services later asked the teacher to sign a different letter P-73 which corrects the teacher's statements as to the third grade events. The letter is not addressed to any particular person. (Testimony, Fulco)
14. While in the fourth grade the child performed at grade level on the CMT's and he had a successful year. Neither letter was written at a time when the child was a student with the teacher. The teacher testified she did not believe the child required resource help. The parent believes asking the teacher to sign a second letter is covert.

When P-46 was attached to a letter from the parent's attorney threatening litigation, the Director of Pupil Services probably wanted to correct some misstatements in the P-46. The testimony is conflicting but the letter can be understood that the teacher continued to suspect the child had some underlying problems. In any event, the content of the letter is immaterial, since no one sought to refer the child for evaluation or identification in the fourth grade. Ultimately the child had very a successful year. (Exhibit P-46, P-48, P-73, Testimony, Fulco)

15. The parent's attorney argues that an inference be made that P-46 was written due to frustration expressed by Ms. Foisy to Ms. Fulco. No such inference is necessary since both witnesses testified at the hearing. The precise question could have been posed to these witnesses and they could have made their statements under oath. Either of the teachers could have referred the child for evaluations relative to identification as a disabled child, as was their duty if either of the teachers believed it was necessary. The record supports that no such referrals were made by either teacher. The letter revision does not change any facts relevant to the referral process in 2004 or 2005
16. The Speech and Language screening concludes the child performed on the CELF-IV, in the high average and average range, with recommendations as follows: based on current testing the child presents overall in language abilities in the average range. His receptive and expressive language as measured is appropriate for his age and current setting. The child was seen as a loner on the playground. The results should be reviewed by the team and with other available information. (Exhibit P-47, P-48)
17. On December 8, 2004 the Connecticut Children's Medical Center (CCMC) began its evaluation. When the parent sent the completed evaluation to the school, the cover letter, dated May 23, 2005 states "at long last we have received the results of a full evaluation". The letter implies at least some of the personnel were aware the child was being evaluation. (Exhibit B-12 p.1, B-13, Testimony, Foisy, Lustila)
18. The fifth grade report card indicates the child's final grades were predominantly B's and C's. The child had lower grades in the fourth quarter. He had 12 absences and was tardy on 56 occasions. Several teachers noted poor or inconsistent effort; at least one teacher notes homework is often late. Most of the teacher comments are deleted from Exhibit B-20, in the record. The report card comments for a marking period are deleted by the computer when new comments are added in the subsequent marking period. (Exhibit B-20, Testimony, Foisy)
19. For intake purposes for the CCMC evaluation the parents describe the child as an easy going kid, a nice boy who goes out of his way to help others and is well liked by everybody. The child is described as being young for his age. The child plays easily with his friends and there is very little conflict. When he meets people, he takes a while to warm-up, but is well related. The parents overall concerns are related to the child's academic performance, attention, focus, fidgeting, work completion, organization, independence, written expression and handwriting. There

are some somatic symptoms and occasions of school avoidance. The referring questions do not raise significant concerns about socialization. (Exhibit B-12 p. 3, 4)

20. Dr. Kulas, who performed the neuropsychological part of the evaluation, concludes the child meets criteria for a non-verbal learning disability. Dr. Kulas describes non-verbal learning disability and describes the problems often associated with the disability. The child is described as having broadly average intellectual disabilities with a significant discrepancy between verbal comprehension, average range and perceptual reasoning in the low average range. The child's memory skills are intact for auditory memory tasks but he struggles with visual memory tasks, especially when spatial features are present. Basic visual-spatial and language processing mirror the discrepancies seen in nonverbal learning disabilities. The child's performance on processing and achievement measures confirms many of the hallmarks of nonverbal learning disability. The completion of writing tasks is labor intensive with marginally legible handwriting. The child is able to introduce details in support of a theme in extended written language requirements but he has difficulty organizing his ideas and contextual spelling is problematic. The child has comprehension weakness in extended reading passages when abstract concepts are introduced. The child's strengths are phonological processing, single word reading, and spelling. (Exhibit B-12)
21. The neuropsychologist testified that a neuropsychological evaluation assesses the neurocognitive abilities across several domains, intellectual abilities, language processing, visual perceptual processing, executive functioning or problem solving, planning, attention, concentration memory functioning, and personality functioning to assess how the processing contributes to the difficulties in the home, school, academics and the child's behavior. Basically, the child has difficulty with processing visual perceptual information. He may have difficulty understanding abstract relationships between non-verbal stimuli. (Testimony, Kulas)
22. On the WISC-IV the child performed in the average range, verbal comprehension 99 and ability to organize visuospatial information, low average at 84, with an overall IQ of 94 in the 34th percentile in the average range. On measures of sustained attention and concentration, working memory is 107 in the average range. The child's overall processing speed is in the average range, PSI 94. (Exhibit B-12)
23. The Children's Memory Scales measure the child's auditory and visual memory abilities. The child's performance was in the average range. (Exhibit B-12)
24. On the NEPSY, a measure of neurocognitive functioning, the child's overall language skills are in the superior range. He performed high average on understanding instructions, naming of vision objects and verbal fluency. His visuospatial abilities are in the average range but significantly discrepant from his higher language abilities. The child's visual-motor planning and problem solving are in the average range. The child's fine motor dexterity is quite poor. An interview with the child suggests mild concern for self-esteem. The parent response

to the Achenbach Child Behavior Checklist suggest elevations in withdrawal and inattentiveness. (Exhibit B-12)

It is not clear from either the text of the evaluation or from Dr. Kulas' testimony how the discrepancy in the child's overall language skills in the superior range and visuospatial abilities in the average range impacts on the child's ability to perform. The doctor recommends preferred ways to state instructions to the child, but does not explain why the child with visuospatial abilities in the average range is not able to function in a regular education classroom with other students whose visuospatial skills are in the average range. (Exhibit B-12 pp 7-8)

25. On cognitive efficiency skills the child's global performance was in the average range with variable performance on specific tasks ranging from high average to borderline. The child's high average performance in working memory abilities is beneficial for note taking. Auditory processing is in the low average range. Phonetic coding skills are in the borderline range but tasks which require the child to discriminate speech sounds under distorted conditions are in the average range. The child's overall performance in phonemic awareness is in the 5th percentile, indicating a standard score of 75 a first grade equivalency. On the Test of Word Reading Efficiency, TOWRE and un-timed decoding measures, the score is in at the top end of the average range. The child had composite word reading efficiency solidly in the average range. (Exhibit B-12, Testimony, Kulas)
26. On tasks of reading, reading fluency and cloze procedure demands the child performed in the top end of the average range. The child's performance on the Gray Silent Reading Test is an area of weakness in the child's reading profile. The test result is typical of a child with a nonverbal learning disability. (Exhibit B-12 pp. 9-12)
27. On integrative written language requirements the child's skills are average. Single word spelling is in the 68th percentile. Writing fluency demands the child to quickly organize ideas to complete brief sentences his performance is in the average range. In highly structured writing tasks, at the single prompt level, the child performed in the high average range. In less structured writing tasks with an imposed time constraint his performance dropped but remained in the low end of the average range. In math the child's composite performance is solidly average. (Exhibit B-12)
28. Dr. Kulas states the child has more difficulty with visual memory in comparison to auditory memory, which is typically a good distinction of verbal and non-verbal skills. (Testimony, Kulas)
29. Dr. Kulas states the child has difficulty with writing skills if required to organize complex written assignments and difficulty with fine motor skills. The combined difficulties are typical of a child with a non-verbal learning disorder. (Testimony, Kulas)

30. To address a nonverbal learning disabled student's deficits Dr. Kulas recommends using a child's strengths to accommodate a weaker area. Recommendations for the child include using verbal descriptions of instructions and restating the verbal issues rather than provide non-verbal pictures to follow-up on directions that are misunderstood. Assignments should be written in a planner. Dr. Kulas recommends a social skills training program because children with non-verbal learning disabilities tend to develop some social skill deficits. The evaluation does not identify the child as having a social skills deficit. There is no recommendation for an aide in the CCMC evaluation. (Testimony, Kulas)
31. The CCMC evaluators did not contact school personnel to report on what they knew and observed about the child's social function in the context of the school setting both structured and unstructured. The child was observed to participate successfully in a social skills program in Ms. DePasse's class. The child is not currently involved in a social skills training program at the private school he now attends. (Testimony, DePasse)
32. Non-verbal learning disabled children typically have difficulty with note taking. Dr. Kulas testified the child's good working memory is beneficial for note-taking which is still complicated by his poor handwriting deficits. Many of the recommendations in the evaluation are focused toward non-verbal learning disabled students in general and several of the recommendations such as the one cited in the testimony is contrary to a specific finding in the assessment that the child had a strength in cognitive efficiency noted on B-12 pp 9-10, the child's strength is a capacity to hold information in conscious awareness. Working memory ability is a benefit for tasks such as note taking skills. (Testimony, Kulas, 7/6/06 Tr. p. 110)
33. Dr. Kulas writes in general terms that non-verbal learning disabled students typically have low performance in math. This was not true of the child he tested with solidly average math skills at the time of the evaluation. Some of the recommendations can best be understood as a tool for instructors presenting higher level math curriculum. (Exhibit B-12 p.12)
34. Dr. Kulas states that a non-verbal learning disabled child can perform as well as a non-disabled child in a class where the instructions are predominantly verbally stated. (Testimony, Kulas, 7/6/06 Tr. p. 113)
35. Dr. Kulas testified children with nonverbal learning disabilities are harder to detect in the earlier stages of school; children are diagnosed at a later point. Nonverbal learning disabled children struggle more as the material becomes more abstract. (Testimony 7/6/06 Tr. pp. 113-116)
36. When asked about the role a child's environment plays on the child's ability to learn, Dr. Kulas responds the environment will have an impact even on a neurotypical student and they will perform better; more important is the particular accommodations. (Testimony, Kulas)

37. There is scant information in the record to support any significant concerns about the child's socialization or pragmatic language deficits from either the parent or the school staff. The evaluator had not observed the child's interaction with peers, prior to making a recommendation for a social skills program. The CCMC evaluation does not include class observation, review of the strategies used by classroom teachers, interviews with classroom teachers or the school psychologist. Many of the recommendations are made to address deficits typical of children with a nonverbal learning disability. Given the child's profile he may exhibit some additional deficits in the future.
38. The child's educational progress is best measured by the CCMC evaluation the most recent tests of the child's achievement. Having completed half of the fifth grade when tested, the child's Reading Fluency is at a 6.2 grade level; Passage Comprehension at the 4.0 grade level, with Broad Reading Skills 6.0 and Basic Reading Skills 7.6 solidly above average. Achievement in Math Calculation 5.7, Math Fluency 5.8, Broad Math 6.3, Math Calculation Skills 5.7 Applied Problems 7.2 grade level solidly above average, Applied Problems 7.2 grade level solidly above average. Writing Fluency 6.1, Writing Samples at the 8.9 grade level and Spelling 7.0 grade level. At the beginning of fifth grade the child's total reading score on the Gates-MacGinitie Reading Test was at the sixth grade level. (Exhibit B-8, B-12)
39. The parents notified the school administration the CCMC evaluation was available. Even though the parent wrote there was no rush, the IEP meeting could be held in August. The parent completed a referral form dated 6/6/07. The LEA sent a notice of the IEP meeting on 6/7/2006. The IEP team met on 6/17/06. The LEA followed the proper procedure to notify parents and school personnel of the meeting and provided the parents with the procedural safeguards. The IEP for the 2005-2006 school year states the child's present level of performance relying on the findings of the CCMC evaluation. The parents raised no objection to the IEP at the meeting. The parent signed the consent to the child's initial placement in special education. The prior written notice of the IEP was forwarded to the parents thereafter. From the date of receipt until implementation the parents made no objection to the IEP. (B-13, B-16, B-17, B-18)
40. The child's IEP dated 6/17/05 provides resource room support for a goal to improve study skills by handing in homework and class work in a timely manner, keep an agenda, and use alpha smart for lengthy assignments. There is a second goal for social skills. The child is to receive resource room support for academic work and will have a shared aide in the mainstream classroom. The child's current level of performance is grade level work. (Exhibit B-18)
41. On the first half day of school August 30, 2005 the LEA notified the parents the child's classroom assignment had to be changed to one with the shared aide as prescribed by the IEP. The parent wrote to the resource room teacher, that she was

disappointed the child had not been assigned to a class with the aide as she understood the child would be moved to a class with an aide at the IEP meeting in June. The parent states she will stay in touch. The following day, the parent writes she does not want the child to be moved to the class with the aide, she assumes the child is receiving resource room support; and with the classroom teacher's support she hopes the child will be able to achieve his best while the adults work to resolve the situation. On September 1, 2005 the resource room teacher writes she wants whatever is best for the child and clarifies the parent's decision not to move the child by switching homerooms. The parent is assured the resource room teacher will work closely with the classroom teacher and the parent is asked to contact the writer any time with questions or concerns. (Exhibits P-64, P-65, P-67)

42. On October 10, 2005, Mr. Gamache writes to the parents that he assumes the parents have elected to have the child remain in the homeroom [without an aide] and seeks the parent's confirmation of the decision. The mother responds she would like the child to remain in the homeroom. She appreciates how hard the teacher works to keep the child organized. The parent writes, so far the child's lack of access to the aide has led to a few frustrating evenings when the child has forgotten homework or his agenda at school, but nothing unmanageable. Again stating I will be in touch with the resource room teacher and homeroom teacher if problems occur, but we are very pleased with the child's progress report. (Exhibit P-67)
43. The sixth grade resource room teacher writes to offer assistance with to pack the child at the end of the school day, check the agenda and confirm he has his material for homework. She writes the decision will have to be reflected in the child's IEP. The parent responds they will not allow changes to be made to the IEP, until their attorney reviews the situation and they decide if an IEP meeting is the next step. The parent has every right to consult with counsel but obligations to meet and try to resolve the matter are outlined in the statute and regulation. The parents agree the resource room teacher is to follow her proposed plan. (Exhibit P-68, P-71)
44. The father writes he is pleased with the child's progress report, but is not pleased in the overall handling of the child's special education needs. Mistakes have been made and continue to be made with regard to the Connecticut Department of Education rules and he intends to see to it they are rectified to the child's benefit and to the parent's satisfaction.
45. Mr. Gamache responds to please let him know "what mistakes" so the issues can be addressed. The parent responds that after reviewing the rules and statutes regarding special education, it is clear the cost of the evaluation should be borne by the school system. The parent received a response stating the typical circumstances for reimbursement of evaluations and that the parent's CCMC evaluation did not meet the requirements. The father's October 7, 2006 communication states the offer to place the child in a class with a teacher's assistant was yet another mistake on the part of the Director of Pupil Services. The parent states since the child was started in the class and was happy with it, we were not going to disrupt him to

accommodate another oversight by the Director of Pupil Services. (Exhibit P-69, P-70, B-18, B-19, B-28)

46. There is no evidence of any particular or unique need of the child that is sufficient to find a proposal to move the child on the first day of school would have caused a disruption. The proposal was a reasonable suggestion. There is no basis for characterizing the child as happy in a placement where he spent one-half of a school day. The child remained in a class without an aide at the parent's request. The teachers made accommodations and the child was able to progress in the regular education curriculum. Any possible disruption to the child's happiness or comfort would result from the parent's decision not to move the child on the first day of school. The child experienced some difficulty, as his testing profile would suggest. The child's needs are not so severe, unique or specialized that they cannot be provided by the LEA in a public school setting. All of the special education needs of the child can be met in the regular education classes with a minimum of supplementary aids and services.
47. The child's interim progress report states in all classes, the child is well behaved, he is working to potential, and he is doing well. The comment states the child is off to a wonderful start in the sixth grade. The second interim report is the child's math grade is falling. The first quarter report card the child has B and C grades. (Exhibit B-25, B-31, B-32, B-64)
48. The evidence supports a finding the child made progress in his sixth grade program. The dissatisfaction expressed in the father's e-mail regarding homework support and the lack of the classroom aide was most significant in January. The parent's dissatisfaction coincides with a decision at the end of January to send the child to a private school and request payment from the LEA. It is clear the school team tried on several occasions to either move the child to the class with the aide or modify the language in the IEP. (Exhibit B-25, B-31, B-32, B-64)
49. The LEA tried to rectify the child's placement beginning on the first day of school. The parent refused to allow the child's class to be changed or to attend an IEP meeting to amend the IEP. The LEA made every attempt to assure the child would not be denied any educational opportunity intended to be available to him under his IEP. (Exhibit P-64, P-65, P-67, P-70, P-71, B-18, B-19, B-25, B-30, B-31, B-32, B-38, B-30, B-40, B-44, B-45)
50. The IEP B-18 states the school psychologist's services will be provided in the resource room; the service took place in the regular education classroom. The LEA testified the site for delivery of social/behavioral services was erroneously documented in the IEP to take place in the resource room. The psychologist testified she described the program to the parents at the IEP meeting on June 17, 2005. The program as described takes place in the regular education setting. The parents did not object at the IEP meeting or while the child was participating in the program. The parents did not find it necessary to contact the school because of some negative

impact the child experienced because of the program. The CCMC evaluation does identify any particular need of the child to require the program take place in the resource room. The evaluation in fact does not identify the child has such a need. It states children with a nonverbal learning disability often develop social skill deficits. All of the child's courses are regular education courses. The child's peers are in the regular education setting. There is no evidence the child has peers in his resource room to participate in such a program. There is sufficient evidence to find that the child should participate in a social skills program with his peers in the regular education setting. It is appropriate to monitor the child's interaction with peers in the regular education setting. There is no evidence the child's peers are in the resource room. The regular education classroom would be the appropriate and least restrictive environment for delivery of the social skills program for the child. (Exhibit B-18, Testimony, Coleman)

51. The school psychologist, who implemented the social skills program in a nine week segment, stated the child responded very well. He actively participated in role plays and demonstrated an ability to work with others even volunteering to present skits to the group. The classroom teacher saw the child smiling, laughing, and enjoying the program. There is sufficient evidence to find the child could tolerate the social skills program in the regular education setting. At the conclusion of the nine week program the psychologist testified she monitors the child's social skills in the classroom as well as other venues in the school. (Exhibit B-12 Testimony, Coleman, Foisy)
52. The child's social skills program is provided in the regular education classroom with a small group of peers. Particular segments from the social skills program were selected to address the child's particular needs. The program addresses the child's IEP social/behavioral goals and objectives. The school psychologist assessed the child's performance in class and determined he was able to satisfy the objectives. The school psychologist is responsible for the social/behavioral portion of the child's IEP. (Exhibit B-18, Testimony, Coleman)
53. The parents made a unilateral placement in a private secondary school, which is not a special education school approved or otherwise. The child's placement is by performance level and there is no individual programming, classroom aide or social skills program. The parents retained the services of a campus based individual tutorial program. The child has adjusted to the school and the parents are pleased with his progress. The child is earning A's B's and C's grades with an overall average of a B-. (Testimony Levesque, Mother, Father, Exhibit B-92)

CONCLUSIONS OF LAW:

1. Whether the Board's failure to address the Owens' ADD results in February 2004, constituted a failure to meet the child find requirements and consequently, a denial of FAPE? Prior to the child's identification as a child with a disability in June 2005, the parent claims the local educational agency (LEA) failed to comply

- with the requirements of child find as it is defined by the regulation applicable in February 2004. The LEA had an obligation to have a pre-placement procedure in place to ensure that children suspected of having disabilities are identified, located and evaluated, including children suspected of being a child with a disability under Section 300.7, even though they are advancing from grade to grade, 34 CFR § 300.125(a)(2)(ii) (1999).
2. A child with a disability is defined at 20 U.S.C. § 1401(A) (3) as a child with mental retardation, hearing impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities and who by means thereof needs special education and related services. The child was not identified as a disabled child in February 2004 and therefore not afforded the protections and procedural safeguards applicable for disabled children. The child was previously identified as disabled and in need of special education services in preschool but was exited from special education in 1999. During the fourth grade the teacher used interventions to help the child with inattention and handwriting. The child continued occupational therapy for poor handwriting until 2002. The child was not referred for identification by the teacher or the parent in the fourth grade.
 3. The mother requested and was provided with an ADD screening and stated she was having the child evaluated for ADD by a professional outside the school system. The ADD screenings indicated the child was at risk for ADD. At the conclusion of fourth grade the child had A's B's and C's with an A in math. He performed at goal or proficient for grade level work on unmodified Connecticut Mastery Tests (CMT) taken without accommodations. The child responded to classroom strategies to improve attention. The teacher had no concern for the child's academic performance and testified she did not believe the child needed resource room help. He made progress in the general curriculum the child's grade level performance is well documented. The child is not simply moved along from grade to grade.
 4. It is reasonable to conclude the LEA provided class support to the child that was sufficient for the parents and teachers to be satisfied with his progress. The child responded to the classroom interventions and had reasonable academic and behavioral performance in the fourth grade. It was reasonable for the LEA to believe the parents intended to follow up on the ADD evaluation. Instead they had a full evaluation at the Connecticut Children's Medical Center, including ADD assessments. The child was found not to have a diagnosis of ADD. The CCMC neuropsychologist testified a nonverbal learning disability is often diagnosed later than other disabilities. There is sufficient information to conclude the LEA satisfied its child find obligations during the fourth grade school year.
 5. Whether or not the LEA satisfied its duty to child find during the fifth grade is not an issue for the hearing. (HO-1). Some of the findings are necessary and relevant to issues of FAPE and compensatory education. At the beginning of fifth grade

the parent had renewed concerns. The classroom teacher again implements some of the strategies used by the fourth grade teacher but ultimately the child is referred to the Child Study Team (CST). The classroom teacher notified the parent the CST would take place and notified the parent of the result of the meeting. The CST met first to review data provided by the classroom teachers and develop an action plan. The child was to meet with the psychologist. The special education director planned to meet with the fourth grade classroom teacher. The classroom teachers were to cut back on homework, and the child was to be screened by the speech and language specialist. The classroom teacher did not have concern with the child's ability to perform grade level work. She had concerns with attention issues. The math teacher had concerns about class performance. The action plan was comprehensive and sufficient based on what the LEA knew about the child at the time. The child was screened in the area of his preschool special education disability, speech and language delay. The Speech and Language screening concludes the child performed on the CELF-IV, in the high average and average range. A follow-up CST meeting on December 13, 2004 resulted in another action plan but the child's work was on grade level at that time.

6. The parent's attorney challenges the procedural safeguards afforded the parents during fifth grade while the LEA screened the child in the CST process. In October 2004 and December 2004 the child was not identified as a child with a disability. The CST is a regular education function. Even though the child was identified as a preschooler he was exited from special education in 1999. The parents claim they were denied rights to participate in the CST process and not provided prior written notice. A student is not afforded the rights of procedural safeguards which are required upon initial referral for special education or when a parent requests an evaluation, 34 CFR§ 300.504(a)(1). The record provides the parents were informed the CST was to meet, by the classroom teacher, who summarized the actions the team planned as interventions for working with the child.
7. The mother wrote to the fifth grade classroom teacher that she cancelled the ADD evaluation due to a conflict and because the child was doing better. She hoped the problem was resolved. The father testified he wanted the ADD evaluation cancelled because he wanted a different evaluator. Both parents testified they had not submitted a request to have the child evaluated for a disability or identified as a child with a disability. Without making a request of the LEA to evaluate the child, the parents had the child evaluated at the Connecticut Children's Medical Center (CCMC) beginning on December 8, 2004.
8. Whether the LEA provided a FAPE in the 2005-2006 school year? The CCMC evaluation concludes the child meets the criteria for non-verbal learning disability. Dr. Kulas describes non-verbal learning disability and the problems often associated with the disability. The child's performance on many of the

subtest in the CCMC evaluation reveals a variety of strengths and weaknesses. Overall, with a few exceptions the child's performance is in the average range.

9. The LEA followed the proper procedure to notify parents and school personnel of the meeting and provided the parents with the procedural safeguards. The parents attended and participated in the IEP meeting planned to determine whether the child should be identified as a child with a disability on June 17, 2005. The student was identified as a student with disabilities pursuant to the Individuals with Disabilities Education (IDEA) 20 U.S.C. § 1400 and Conn. Agencies Regs. § 10-76a-1(d).
10. The parties agreed the child has a specific learning disability and is eligible to receive a free and appropriate public education (FAPE) as defined in 20 U.S.C. § 1401 (9). In Connecticut, regulation specifically assigns to the LEA the burden of proving, by a preponderance of the evidence, that a student's program and placement is appropriate. Conn. Agencies Regs. § 10-76h-14.
11. As required by 20 U.S.C. § 1414 (d)(3)(A) the IEP for the 2005-2006 school year states the child's present level of performance, the goals and objectives, the services the child will receive, the criteria for measuring progress, the initiation date and the duration of the services.
12. The team relied largely on the findings of the CCMC evaluation supplemented by observation, class performance, and a speech and language screening. The parents raised no objection to the IEP at the meeting on 6/17/05. The parent signed the consent for the child's initial placement in special education. The prior written notice of the IEP was forwarded to the parents thereafter. From the date of receipt until implementation on 8/29/06 the parents made no objection to the IEP.
13. 20 U.S.C. § 1401(9) and the regulation at 34 CFR § 300.17(d) requires a free and appropriate education to be provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d) of this title and the regulations 34 CFR § 300.320 through 300.324. The IEP is individualized to meet the child's unique needs and should be developed, reviewed and revised in meetings according to this section. The parents do not dispute the planning of the IEP or the procedures followed in developing the IEP. The challenge is the special education was not provided in conformity with the IEP.
14. On the first half day of school August 30, 2005 the LEA notified the parents the child's classroom assignment had to be changed to one with the shared aide as prescribed by the IEP. The parent wrote to the resource room teacher, that she was disappointed the child had not been assigned to a class with the aide as she understood the child would be **moved** to a class with an aide at the IEP meeting in June. The parent states she will stay in touch. The following day, the parent writes she does not want the child to be moved to the class with the aide. She assumes the child is receiving resource room support; and with the classroom

- teacher's support she hopes the child will be able to achieve his best while the adults work to resolve the situation. The requirement for an LEA to make the child's program conform to the IEP cannot be taken lightly. In the present case the IEP meeting was held at the end of the school year and the child's class assignment was brought to everyone's attention on the first day of school. It is not credible that had the child been assigned to the class with the shared aide on the first day of school there would be no dispute at least so far as the issue of the conformity of the child's program to the IEP.
15. This is not a question of conformity with the IEP. It is a question of whether the IEP or the parent can determine the assignment of personnel. The IEP does not specify a particular classroom or teacher. The only resolution that appears to satisfy the father is keep the child in the class and hire an aide for the class. The placement was brought to the parent's attention on the first day of school. The only evidence offered of the child's need for the particular class assignment was a claim the child is happy and the move will cause disruption. The CCMC evaluation does not identify a unique need of the child that requires an aide nor does it make a recommendation for the child to have an aide. The IEP specifies the child shall have the support of a shared aide 5-8 hours per week in the regular education classroom.
 16. The IEP is required to meet the unique needs of the child. At the time the IEP was drafted in June 2005 the child was performing on grade level. His achievement tests reported in the CCMC evaluation finds the child performs on grade level. The CCMC evaluation does not require the child have an aide to meet his IEP goals and objectives. In the past the child has always achieved grade level work without an aide. The child is provided with resource room support with his academic goals to improve study skills; with three objectives, hand in class work and homework assignments on time, keep an agenda, and use alphasmart on lengthy written assignments. The child is in regular education for all of his classes and receives 3.75 hours of resource room support per week. The child has minimal special education requirements in his IEP. The child's IEP consists of two goals. The resource room teacher and the aide are both assigned to help with one goal and three objectives as stated herein. The second goal is the responsibility of the school psychologist. The school team modified and made accommodations to assure the child would be able to meet the IEP goals and objectives while waiting for the parent's response. The parents were notified of the accommodations and supports the child would be provided.
 17. The issue of placement with a shared aide could have been rectified on the first day of school. The LEA expected they would receive a response from the parents in a short period of time. A month later they wrote requesting the IEP required revision if the child is to remain in the class they have requested. The father testified he responded through his attorney on December 27, 2005. The father documented his dissatisfaction with missed homework assignments in January of

- 2006, immediately before he notified the LEA he intended to send the child to a private school and seek reimbursement for the cost.
18. The LEA again attempts to have the parent cooperate and come to an IEP meeting. In the interim the father documents a number of agenda and class preparation problems. If there was any sincere interest in resolving the issue the father would have agreed to attend an IEP meeting as the LEA requested and as the law requires at 34 CFR § 300.324.
 19. Whether a program is appropriate is typically analyzed using the two-prong test articulated in *The Bd. of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982). The first prong requires the LEA must follow the procedural requirements of IDEA, *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998) quoting *Rowley*, 458 U.S. 176, at 206. The LEA has substantially met the procedural requirements in developing and amending the 2005-2006 IEP. The failure to have the child's program comport with the IEP was largely due to the parent's delays. When the team finally met, the parents stayed long enough to request an out of district placement for the child. The district amended the IEP.
 20. The second prong of *Rowley*, requires the individual education plan ("IEP") offered by the LEA must be reasonably calculated to enable the child to receive an educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207, *Mrs. B. v. Milford Board of Education*, 103, F.3d 1114 (2d Cir. 1997). In Connecticut, regulation specifically assigns to the LEA the burden of proving, by a preponderance of the evidence, that a student's program and placement is appropriate. Conn. Agencies Regs. § 10-76h-14. The child did not miss any educational opportunity nor was he denied a FAPE by attending a class without an aide. The child made progress towards his goals and objectives (P-61). The parents were satisfied with the child's progress as they both indicated in their response to the child's progress reports. The parents write they are satisfied with the child's progress, stating the lack of an aide has not been a problem. The parents did not want the child moved to a class with the shared aide. The child was able to perform at grade level and make educational progress without an aide.
 21. Subsequent decisions elaborate on how much benefit is sufficient to be meaningful. The Act requires educational *progress* rather than a program that is merely of benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 488 U.S. 1030 (1989) (Emphasis original). The IDEA was enacted to assure that all children with disabilities have available to them a free and appropriate public education which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction, *Rowley*, 458 U.S. 176, 188-189. Such instruction and services must comport with the child's IEP. *Hendrick Hudson v. Rowley*, 458 U.S. at 201-204. The IDEA does not require states to maximize the potential of handicapped children, *id.* at

- 197 n. 21, 102 S. Ct. 3034, but must be reasonably calculated to receive educational benefits, *M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Ed.*, 226 F.3d 60, 62 (2d Cir. 2000).
22. In order for FAPE to be offered, a school district must show it complied with the statutory elements of an IEP; the goals and objectives in the IEP are reasonable, realistic and attainable, the special education and related services must be tailored to reasonably accomplish the goals in the IEP. *Board of Education of the County of Kanawha v. Michael M.*, Civil Action No. 2:99-0609, USDC for the Southern District of West Virginia (April 26, 2000), at pp. 18-19. When the aide was not available to the child the classroom teacher and the resource room teacher coordinated efforts to provide the child with the organization he required. The child had grade level performance on his report card, (B-64, B-71) and grade level performance on the CMT's (B-76).
23. The child was unilaterally placed in a private school and the parent requested reimbursement. The LEA has satisfied its burden of proving it provided a FAPE for the child. The father unreasonably prevented the child from having access to the aide by refusing to allow the child to be moved on the first day of school. It was unreasonable to refuse to communicate with the LEA or to try to resolve the issue, particularly since he was happy with the child's progress in the LEA program. In January when the father had concern for work completion he still delayed meeting with the LEA. When he did meet at the January 31, 2006 IEP meeting he only stayed long enough to notify the LEA of his intent to place the child in a private school. The only resolution acceptable to the father was for the aide to be provided in the classroom. The LEA has satisfied its burden of proving it provided a FAPE for the child.
24. As an additional claim, the parents contest the social skills program and monitoring that take place in the regular education classroom. The school psychologist was credible when she testified the regular education classroom was the intended site for the service. The program does not fail to provide the child with a FAPE because of the location of the service.
25. An LEA is not required to pay for the cost of the education, including the special education and related services of a child with a disability at a private school if the a FAPE was made available to the child and the parents elected to place the child at private school. If FAPE is in dispute the issues of FAPE and reimbursement are subject to the due process procedures of the IDEA sections 300.504-300-520. see 34 CFR § 300.148.
26. Whether the private school placement is appropriate? *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985) provides the court is empowered to order school authorities to reimburse parents for expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP is proper if the

challenged IEP is found to be adequate. The LEA has satisfied its obligations under IDEA and the necessary inquiry is at an end. *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 134 (2nd Cir.1998). There is no authority to review the appropriateness of the parent's choice of placement or financial responsibility with regard to the placement. The LEA provided a FAPE to the child and there is no basis to order compensatory education.

FINAL DECISION AND ORDER:

1. The local educational agency met its child find obligations toward the child in February of 2004.
2. The local educational agency provided the child with a free and appropriate education in the 2005-2006 school year.
3. The local educational agency is not responsible for the cost of the parent's placement at the private school.
4. The child is not entitled to compensatory education services.