

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Danbury Board of Education

Appearing on behalf of the Parents: Atty. Lawrence W. Berliner, Klebanoff & Alfano, P.C., 433 South Main Street, Suite 102, West Hartford, CT 06110

Appearing on behalf of the Danbury Board of Education: Atty. Christine L. Chinni, Chinni & Meuser LLC, 30 Avon Meadow Lane, Avon, CT 06001

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

The Parents submitted the following issues for the hearing:

1. Did the Board offer the Student a free appropriate public education (“FAPE”) for the 2004-2005 school year (as limited by the Statute of Limitations to the period from March 12, 2005 through the end of that school year)?
2. Did the Board offer the Student a free appropriate public education (“FAPE”) for the 2005-2006 school year?
3. Did the Board offer the Student a free appropriate public education (“FAPE”) for the 2006-2007 school year?
4. If not, would the Parents’ proposed placement at Kildonan School in Amenia, New York provide the Student with a FAPE for the 2006-2007 school year?
5. Is the Board financially responsible for placing the Student at Kildonan School for the 2006-07 school year?
6. Did the Board improperly deny the Parents an occupational therapy evaluation of the Student in the 2006-07 school year?
7. Are the Parents entitled to any compensatory education services to remedy any past denial of FAPE to the Student?

SUMMARY

The Student is a 10 year-old student at Kildonan School (“Kildonan”) in Amenia, New York. He attended third grade there for the 2006-07 school year. He was educated in the Danbury Public Schools for kindergarten, first and second grade in his home school—Great Plain Elementary School (“Great Plain”). The parties agree that he is entitled to special education under the category of Other Health Impaired (“OHI”), Attention Deficit Hyperactivity Disorder (“ADHD”). At the February 22, 2006 Planning and Placement (“PPT”) meeting, the Parents requested an out of district placement. The PPT refused that request and asked the Parents to consent to a psychiatric evaluation of the Student, which the Parents consented to on one issue only. On June 13, 2006 the PPT met to review the psychiatric evaluation and proposed an IEP for third grade at Great Plain. The Board contends that the Student must be educated in the least restrictive environment (“LRE”), which is at Great Plain. The Board further contends that the Parents have agreed to the goals and objectives of the IEPs for kindergarten, first and second grades; that the Student has made progress on these IEPs and that the IEP for 2006-07 offered the Student a FAPE in the LRE. The Parents rejected the 2006-07 IEP in September 2006 and sent notice to the Board that they were placing the Student at Kildonan. On September 21, 2006, the PPT met and refused the Parents’ request for reimbursement of the Kildonan unilateral placement.

PROCEDURAL HISTORY

The Parents’ attorney requested this hearing by mailing it to the State Department of Education (SDE), which received it on March 14, 2007. Hearing Officer (HO) Exhibit 1. This Hearing Officer was assigned to the case on March 16. The Board received a copy of the request on March 26, 2007. A prehearing conference was held on April 9, 2007. The parties reported that a mediation was set up, then withdrawn, as the parties did not think it would be successful. The parties had agreed to waive the prehearing resolution meeting. Exhibit HO-3. The mailing date of the final decision was established as June 11, 2007. The Parents’ attorney stated that he was withdrawing the second issue regarding reimbursement for an independent educational evaluation. Exhibit HO-1. This was confirmed on the record at the first day of the hearing. Hearing dates were agreed on for May 4, 7 and 11 and June 4, 7 and 13. The parties were directed to file witness lists and exhibits by April 27. The Parents’ attorney requested an extension of the mailing date of the final decision to July 9 in order to accommodate the scheduling of the hearing dates. The request was granted.

On April 23 the Hearing Officer received a request from the Parents’ attorney to cancel the May 4 hearing date because of problems scheduling witnesses. He also set forth the relief requested from the Board on the issue of compensatory education. Exhibit HO-2. On April 24 the Board’s attorney sent a letter stating that she had no objection to the cancellation. The request was granted on April 25, and the parties were allowed until April 30 to file witness lists and exhibits.

The hearing convened on May 7. The Parents filed Exhibits P-1 through P-88 on April 30. The Board objected to Parent Exhibits P-1 through P-31, P-85 and P-86. They were marked for identification only. The other Parent exhibits were entered as full exhibits. The Board filed

Exhibits B-1 through B-24 and its witness list on April 30. The Parents' attorney objected to Exhibits B-1 through B-18, which were marked for identification. After discussion on the record, the objections to Exhibits P2 through P14 and B-1 through B-18 were withdrawn and they were admitted into evidence for history and background purposes. The Parents' attorney presented his opening statement. The Parents then presented testimony from the Mother. Exhibit P-1 was admitted as a full exhibit. Her direct testimony continued on May 11. Additional hearing dates were agreed on for June 26 and July 2. The mailing date for the final decision was extended to July 26 because of the need for more hearing dates.

The hearing continued on June 4. The Parents offered Exhibits P-89 through P-91, which the Board objected to because they were not filed at least five business days prior to the hearing. Exhibits P-89 and P-90 were marked for identification only. Exhibit P-91 was admitted into evidence. The Mother's direct testimony was interrupted for the testimony of Robert Kruger, Ph.D., clinical psychology. On June 7, the Parents presented the testimony of Robert Lane, Ph.D., Academic Dean, Kildonan School. Exhibits P-85, P-89 and P-90 were admitted through Dr. Lane's testimony. The Mother completed her testimony on June 13. Exhibit P-86 was admitted during the Mother's testimony. The Parents filed Exhibit P-92. The Parents rested their case unless the Board objected to Exhibit P-92, in which event they wished to recall the Mother.

Exhibit P-92 was admitted as a full exhibit on June 26. After waiving an opening statement, the Board began presenting its case. Charles Manos, Coordinator, Special Services, for the Board testified. Prior to his current position, which he has held for two years, Mr. Manos was employed as a school psychologist for 25 years by the Board. In addition to his state certification as a school psychologist, Mr. Manos is licensed by the Connecticut Department of Mental Health and Addiction Services as a marriage and family therapist. He was permitted, over the Parents' objection, to testify as an expert in the area of testing and psychoeducational evaluations of children. The Board then called Keshia Smith, Principal, Great Plain Elementary School. She has 15 years experience as a teacher and school administrator. Additional hearing dates were agreed on for July 12 and 30. The mailing date for the final decision was extended to August 23 because of the need for more hearing dates. On July 2, the Board presented the testimony of Lisa Capone, Grade One teacher, Great Plain Elementary School, and Susan Kernochan, Special Education teacher in the Danbury schools for 18 years. She was the Student's resource room teacher in grades one and two.

On July 12, the Parents filed Exhibits P-93 through P-95. They were admitted without objection as full exhibits. The Board presented testimony from Donna Warner, Supervisor, Special Education, Elementary Level. Ms. Warner has 10 years experience in that position and 20 years experience as a special education teacher. The Board rested its case. The Parents declined to present rebuttal testimony. The July 30 hearing date was canceled.

The parties requested time to file briefs. It was then agreed to file simultaneous briefs by September 7 and simultaneous reply briefs by September 21. The mailing date for the final decision was extended to October 15, 2007. The Hearing Officer sent the attorneys a letter on July 20 confirming these dates. The Parents' attorney sent a letter on August 8 requesting a one-week extension to the briefing schedule until September 14 and 30 respectively. The request,

which was not objected to by the Board's attorney, was granted. On September 7, the Board's attorney sent a letter requesting a 10-day extension to the briefing schedule until September 24 and October 12 respectively. Both attorneys agreed that the postponement would not have any detrimental effect on the Student. The request was granted on September 10 and the mailing date for the final decision was extended to November 5, 2007.

The Findings of Fact incorporate various portions of the Parties Proposed Findings of Fact. To the extent that the findings of fact are conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels. Bonnie Ann F. v. Callahan Independent School Board, 835 F.Supp. 340 (S.D. Tex. 1993). The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record. Id.

FINDINGS OF FACT

1. The Student has a birth date of January 18, 1997, is 10 years old and recently completed third grade at Kildonan. Testimony of Mother and Robert Lane; various Board and Parent Exhibits.

2. The Student (also referred to as "W.") attended Danbury public schools in kindergarten, first and second grades at Great Plain. Testimony of Mother.

3. At a May 2, 2000 PPT meeting, he was identified as eligible for special education as speech/language impaired. He received one-half hour of weekly speech services from the Danbury Public Schools. Exhibit P-2. On May 4, 2001, the PPT conducted an annual review and found that W. had mastered his IEP goal. One-half hour of speech services were continued. Exhibits P-3 and P-6.

4. W. did not attend a preschool program during that period of time. Exhibit P-4. The Parents sought a neurological evaluation because of concerns with delayed toilet training. On July 13, 2001, Dr. Anna Alshansky, Pediatric Neurologist, recommended a pediatric psychotherapist, an occupational therapy evaluation and a developmental preschool program. Id.

5. On August 31, 2001, the Parents requested the Board to conduct a developmental evaluation because of concerns with fine motor and adaptive areas, including that he was not toilet trained at that time (age 4 years, 7 months). Exhibit P-5. The PPT met on October 18, 2001 to discuss the evaluations that had been done. Exhibit P-6. The PPT did not find any need for supports other than continued speech therapy for one-half hour per week. Id.

6. In September 2002, the Parents enrolled the Student in a transitional kindergarten program at St. Joseph's School, a parochial school with no special education or related services. Testimony of Mother. The Parents could have enrolled the Student in the Danbury Public Schools kindergarten program that year. Id. Accordingly, the Student was placed on a service plan for that year, and did not receive the full complement of special education and related services. Id.

7. On September 13, 2002, the PPT met and converted his IEP to a service plan while he attended preschool and transitional kindergarten at St. Joseph's private school program. Danbury continued to provide one-half hour per week of speech services. Exhibit P-7.

8. On January 11, 2003, the Parents sought an oral motor/feeding/speech evaluation from Dorian Cundari because of concerns with speech clarity. His Mother expressed the concern that his progress in speech therapy had slowed. Exhibit P-8. Ms. Cundari recommended 45 minutes per week of individual therapy by a speech and language pathologist. Id.

9. The Parents continued the Student's enrollment at St. Joseph's for a second year. Testimony of Mother. The Danbury PPT developed a service plan for the 2002-03 school year continuing one-half hour per week of speech therapy. Exhibit P-9.

10. In September 2003, the Parents enrolled the Student in kindergarten at Great Plain. At that time he was 6 years, 8 months old. Exhibit P-10.

11. On September 22, 2003, the Board convened a PPT meeting and determined that the Student was eligible for special education under the speech and language impairment category and provided one hour per week of speech services to address articulation difficulties that affected communication with peers and adults in the Board's kindergarten program at Great Plain. Exhibit P-10.

12. The IEP had one goal and three objectives. The Parents did not express any disagreement with the IEP at that time. Id.

13. On or about November 25, 2003, the Student's Principal requested the assistance of the Child Intervention Team because the Student was having difficulty recognizing his letters and their sounds after completing a kindergarten program at St. Joseph's School during the previous school year. Exhibit P-12.

14. On or about March 6, 2004, the Student's teacher requested additional assistance for the Student because he was struggling with letter recognition, he gets confused, and because of problematic behaviors after a year in kindergarten. Id.; and Testimony of Mother.

15. The Parents arranged a follow-up visit with Dr. Alshansky, who completed a report to the Student's physician. She diagnosed the Student with ADHD and recommended a psychoeducational evaluation to determine his learning difficulties. She also discussed the medical management of ADHD. Exhibit P-14.

16. On or about March 17, 2004 the Parents wrote the Board and requested a psychoeducational evaluation due to the Student's inability to grasp sound and letter recognition and due to Dr. Alshansky's findings indicating that he had ADHD. Exhibit P-15. The Parents requested a PPT meeting to discuss their evaluation request. Exhibit P-16.

17. On March 29, 2004 the Board convened a PPT meeting to review the Student's academic progress, health concerns shared by the Parents that affected the Student's learning,

and the Parents' request for an evaluation. Exhibit P-17. The PPT recommended continuing one hour of speech and language services per week and continued monitoring by the Child Study Team. The Parents did not have a medication plan in place for treating the ADHD. The Parents were given a consent form to sign for the evaluations (cognitive, academic and speech/language), social/ developmental history and updates (medical and classroom). Id.

18. The Parents did not sign that consent form at that time. They wrote to Ms. Donna Warner requesting the names of the tests that would be administered and the results at least five days prior to the PPT meeting to review them. Exhibit P-18. On April 13, 2004 a PPT meeting was convened at the Parents' request. The Parents consented to the evaluations after the team explained them. Exhibit P-19.

19. On June 7, 2004, the PPT met to review the evaluations. Exhibit P-20. Carol Nielsen, school psychologist, conducted the psychoeducational evaluation. Id. at 14-18. Her testing indicated that the Student's full scale IQ of 83 was in the low average range. Id.; and Testimony of Mr. Manos. Overall, the Student's scores on Ms. Nielson's testing consistently indicated that the Student's IQ was in the low average range. She also noted that the Student's scores were estimated to be below his actual cognitive functioning level due to his difficulty attending. Exhibit P-20 at 17.

20. Based upon the evaluations, the PPT did not find him eligible for special education and related services under the learning disability label, however, the team did find the Student eligible under the OHI label by virtue of his ADHD. Id. at 29-30.

21. Ms. Susan Kernochan, a special education teacher, administered the academic evaluation. Id. at 27. The Student scored in the low range on the Letter-Word Identification Test, the Word Attack Test, and the Passage Comprehension Test. Id. Although math was an area of overall strength for the Student, he also scored in the low average range in the math reasoning cluster, of which vocabulary is a component. Id. at 28. Based upon Ms. Kernochan's testing, the PPT included goals in the Student's IEP to improve his reading readiness skills, with objectives regarding letter recognition, production of correct sounds for letters, identification of consonants, and distinction among sounds. Id. at 5-6. The IEP also included a goal concerning math vocabulary, to address the weakness that Ms. Kernochan had noted in the math reasoning testing. Id. at 7; and Testimony, Ms. Kernochan.

22. Ms. Vonnie Neufeld conducted the speech and language evaluation. Exhibit P-20 at 19-21. Ms. Neufeld found weaknesses in the areas of articulation and language competence, and recommended that the Student continue to receive direct speech services. Id. The IEP provided for the Student to receive direct speech services for one hour per week, with a goal of improving the Student's listening and speaking skills, including objectives concerning use of age appropriate sounds, conventional syntax, and proper and concise sequencing. Id. at 9.

23. The PPT completed the least restrictive environment ("LRE") checklist at the meeting, and determined that the Student required some pullout services in a resource room. Id. at 10 and 33-34.

24. The June 7, 2004 PPT developed the Student's IEP for the 2004-2005 school year, his first grade year, based upon the weaknesses described in the evaluations. The Student's IEP incorporated three goals, in the areas of reading, math vocabulary and speech. Id. at 5-9. The Parents participated in the PPT, and provided input at the meeting at which the goals and objectives were developed. The Parents did not contest these goals and objectives at the PPT. Id. The Parents were active participants in the PPT, and also corresponded with the Board during the Student's first grade year. Exhibits P-23; P-25; P-27; and P-28. The Parents also retained counsel during the Student's first grade year. Exhibit P-30 at 1; Testimony of Mother.

25. The Parents did not contest the results of the Board's evaluations, or request an independent evaluation. Exhibit P-20 at 2. The Parents did not object to the goals and objectives in the IEP. Id. The Parents attended the June 7, 2004 PPT meeting with an advocate. Id. at 1.

26. The Student received special education and related services from the Board during the 2004-2005 school year, his first grade year, pursuant to the IEP developed at the June 7, 2004 PPT meeting. Id.; and Testimony, Mrs. Capone, Ms. Kernochan; and Ms. Warner. The Student's first grade IEP provided one hour of speech services per week and two and one-half hours of resource room services per week – one and one-half hours devoted to reading and one hour devoted to mathematics vocabulary. Exhibit P-20 at 1 and 10; and Testimony of Ms. Capone. During the rest of the school week, the Student was in a regular education classroom with non-disabled peers. Id.; and Testimony of Ms. Warner. There were fourteen students in the Student's regular education class. Testimony of Mrs. Capone.

27. On September 2, 2004, the Mother sent a letter to Mrs. Capone advising her that W. would not be arriving at school until 11:00 a.m. on Tuesday, September 7 and on the following Mondays during the month of September. Exhibit P-21. Ms. Warner wrote to the Parents on September 8 that the revised schedule would necessitate a change in W.'s IEP. Exhibit P-22. The Mother wrote to Ms. Warner on September 11 and advised her that a September 15 PPT meeting was not convenient for her, her husband and their attorney. She also stated that there was "no new information regarding W[.] that would warrant a revision of his June 7, 2004 IEP at this time." Exhibit P-23.

28. On October 12, 2004, the Student was suspended from school for two days for hitting another student. Exhibit P-25; and Testimony of Ms. Smith and Mrs. Capone. In response to this incident, Mrs. Capone, the Student's regular education teacher in first grade, developed a behavior plan for him, in consultation with the Principal, Keshia Smith, and Susan Kernochan, the Student's special education teacher. Exhibit P-26; and Testimony of Mrs. Capone and Ms. Smith. The principal and the Student's teachers met with the Mother about the incident. Testimony of Mother and Mrs. Capone.

29. The Student's report card indicated during the first marking period, after the behavior plan was in place: "I am pleased to see that W[.]'s behavior has improved. He seems to be invested in his behavior plan and looks forward to earning his sticker at the end of the day." Exhibit P-40 at 6. No additional behavioral interventions were necessary during the rest of the school year. The behavior plan remained a regular education intervention. Testimony of Mrs. Capone; Ms. Kernochan; and Ms. Smith.

30. At an open house with all parents in October of 2004, Mrs. Capone recommended a number of reading strategies to use at home with the students. Exhibit P-24; Testimony, Mrs. Capone. The Mother did not employ them, and claimed to be using her own strategies. Testimony Mrs. Capone.

31. Ms. Kernochan and Mrs. Capone collaborated closely regarding the Student throughout his first grade year. Id.; and Testimony of Ms. Kernochan. Both teachers worked on both sight words and phonics with the Student. Id. It is important to teach students both sight words, which cannot be decoded, and phonological approach to reading, for use with words that can be decoded. Id. Neither approach is sufficient to teach a student to read without the other approach, because a fluent reader must be able to both recognize sight words and decode unfamiliar words that can be sounded out. Id.

32. Both Mrs. Capone and Ms. Kernochan recommended that the Mother go over the sight words the Student was learning in school at home. Id. They made the Student a “word ring” containing the sight words the Student needed to work on. Testimony Mrs. Capone. At the Mother’s request, they made a second word ring with colored index cards, because the Parent claimed that colored materials enhanced her son’s learning. Id.; and Testimony of Mother. The Parents or the Student lost both word rings. Testimony of Mrs. Capone. The Mother never requested an additional replacement word ring, and refused the Board’s offer of another replacement ring. The Mother ultimately refused to go over the sight words with the Student, claiming that she was going over her own sight words with him. Id.; and Testimony of Mrs. Kernochan and Mother.

33. The Student’s regular and special education teachers repeatedly tried to work with the Mother during the year, and offered strategies and materials for the Mother to use at home. Testimony Mrs. Capone and Ms. Kernochan.

34. Ms. Kernochan also recommended that the Student, and many of the other students she worked with, read books aloud at home at his independent level, to improve his fluency. Testimony of Ms. Kernochan. In her experience, students who read books aloud in school that they are able to read easily without decoding build confidence and allow the students to read in an easy manner. Reinforcing this skill in the home, with family members with whom students are comfortable and familiar, is very helpful. Id. She sent such books home with the Student throughout the year. Id. On every occasion, the books were returned unread; the Student told Ms. Kernochan that he had not read them. Id. The Mother later told Ms. Kernochan that she was providing other reading material to the Student at home. Id.

35. The Board attempted to schedule PPT meetings several times in September and October 2004. Exhibit P-29. They had been canceled at the Parents’ request. Id. The reason given was that their attorney was not available. Id.; and Exhibit B-16. The Parents also obtained an independent evaluation of the Student from the Yale Child Study Center in August and September 2004. They never shared this information until the report was sent by the Parents’ attorney to the Board’s attorney on November 23, 2004. Exhibit P-30; and Testimony of Ms. Warner. The Parents had not requested that the Board fund an independent evaluation prior to obtaining the Yale evaluation. The Mother testified that the purpose of obtaining the Yale report

was to get a second opinion and a more in depth evaluation of the Student. Testimony of Mother.

36. The PPT meeting scheduled for November 30 was rescheduled at the request of the Board's attorney. Exhibit B-17. The meeting was convened on January 28, 2005 to discuss the Yale report and Parents' requests for an assistive technology evaluation and a central auditory processing evaluation. The Parents also requested changes to the behavior plan. Exhibit P-33. The Yale evaluators never sought input from the Board prior to completing the evaluation, but they did review some of the Student's school records, including the 2004 evaluations. The Yale evaluators stated that their results were consistent with previous evaluations. They reported that the Student had "low average to average cognitive abilities"; that he had great difficulty with his memory; that his language abilities were in the low average range, especially in abstract or social situations; that he was diagnosed with ADD and not a learning disability due to the pervasive nature of his difficulties; that he had auditory attention deficits that impacted his attention; that he had poor self esteem; and that he struggled to make sense of his thought processes and the increased demands that were being placed upon him. Exhibit P-30 at 11. The Board's team members were unsurprised by the results of the Yale Report, including its recommendations, and did not believe that the report presented any basis for revising the Student's IEP. Exhibit P-33 at 3; and Testimony of Ms. Warner.

37. On February 11, 2005, the Mother wrote to Ms. Warner requesting additions and changes to the PPT meeting summary. Specifically, she claimed that the Board's team members refused to implement the recommendations of the Yale report and the Student's pediatrician regarding 15 minutes of daily exercise in addition to recess. She also stated that the Parents disagreed with Mrs. Capone's assessment of W.'s progress. Exhibit P-34. Ms. Warner acknowledged receipt of the letter, but did not amend the PPT summary. She also stated that with regard to the pediatrician's letter (Dr. Free) it was presented at, rather than, prior to the PPT meeting, which was the reason the team did not consider it at the January 28 PPT meeting. She added that W. was already receiving at least 15 minutes of physical exercise in the form of walking during the course of the day. Exhibit 35.

38. The Parents and the Board were represented by counsel at the January 28, 2005 PPT meeting. Exhibit 33 at 1.

39. The Parents had arranged for private speech and language services with Dorian Cundari in an effort to remediate the Student's reading difficulties. Testimony of Mother.

40. The Parents requested Dorian Cundari to complete a speech and language assessment during the 2004-05 school year and provided a copy of that evaluation report to the Board on or about March 3, 2005. *Id.*; and Exhibit P-36.

41. Ms. Cundari's report noted that the Student had a "multidimensional communicative delay characterized by restrictions in auditory perception and processing, expressive language, pragmatics, articulation (with mild oral-motor issues remaining) and fluency." Exhibit P-36 at 22. The report also noted some strengths in receptive language skills and language content, as well as weaknesses in overall comprehension, word retrieval, moderate to severe restriction in language production, significant deficiencies in phonological awareness

skills that impacted reading and spelling, as well as academic struggles that were secondary to attention and memory problems. Id. at 23. Ms. Cundari found W. to be at risk for central auditory processing problems. A series of recommendations were made to address speech and language issues, articulation, fluency, word retrieval, expressive language, phonemic awareness, pragmatic language, auditory memory, auditory processing and strategies for classroom instruction. Id. at 24-29.

41. The Board provided the Parents with a copy of the Assistive Technology and Central Auditory Processing evaluation reports on or about April 14, 2005. Exhibit P-37.

42. Ms. Kernochan administered the Developmental Reading Assessment (“DRA”) to the Student on several occasions during the 2004-2005 school year. Exhibit P-38 at 12-15; and Testimony, Ms. Kernochan. Over the course of his first grade year, the Student’s scores on the DRA improved from level A, which describes a pre-reading skill level, to an independent reading level of 3 and an instructional level of 4. Id.; Exhibit P-31 at 1; and Testimony of Mrs. Capone. This represents one year’s growth in DRA scores. Testimony of Mrs. Capone and Ms. Kernochan. The Student would have had an independent reading level of 4 at the end of the 2004-2005 school year but for his score on a subtest, word accuracy. This subtest requires 95% for a passing score. The Student received 94%. Exhibit P-38 at 12; Testimony of Ms. Kernochan. His scores in all areas of word recognition improved significantly from the beginning to the end of the school year, except in the area of rhyming, in which he had already achieved a score of 100% in September 2004. Id. His scores on the subtests improved as follows: letter identification test from 46 out of 54 in September to 54 out of 54 in May; segmentation from 68% in September to 100% in May; isolation from 53% to 93%; deletion from 45% to 75%; substitution from 10% to 60%; and blending from 70% to 80%. Id. On the Ohio Word Test, the Student scored 0 out of 20 in September and 15 out of 20 in May. Id. On the Sight Word Assessment, the Student scored 20% on the first 25 sight words in September and 80% in April. Id.

43. The Student achieved slow progress, then satisfactory progress, then mastery of both goals and 10 of the 11 objectives in his first grade IEP by the end of that school year. He made progress on the goals and objectives throughout the school year. Id.; Exhibits P-38 at 27-38; P-40 at 7-14; Testimony of Mrs. Capone. He received no unsatisfactory progress markings from his regular education teacher in any area over any marking period, and received a number of “Very Goods”, the highest grade possible. Exhibit P-40 at 3; and Testimony of Mrs. Capone. The Student’s test results and performance in both regular and special education indicated that the Student’s 2004-2005 IEP and program were appropriate. Testimony of Mrs. Capone and Mrs. Kernochan.

44. The Student mastered all of his speech objectives, which were agreed on at the June 7, 2004 PPT at which his IEP was developed for 2004-05, his first grade year. Exhibit P-38 at 19. His speech and language pathologist recommended continuing speech and language services for him during the 2005-2006 school year due to difficulties in the areas of stuttering and generation of conventional sentence structure during spontaneous speech. Id. The Student’s IEP for 2005-2006, his second grade year, included a goal and objectives to address this issue. Id. at 7.

45. The Parents expressed their concern that the Student was not on grade level with respect to reading and that his skills were far behind expectations for reading and writing. The Parents believed that the Student had made adequate progress with math calculations at that time. Testimony of Mother.

46. The Student's IEP for the 2005-2006 school year was developed at the PPT held on May 18, 2005. Exhibit P-38. The Parents and the Board were represented by counsel at this PPT. The Parents had ample opportunity to participate in the meeting and offer their input. Id. The Student's 2005-2006 IEP, for his second grade year, incorporated goals and objectives in the areas of reading and communication. Id. at 3-7. The Student had mastered the goals and objectives in the area of math vocabulary, and, as math was an overall area of strength for him, the PPT did not continue goals and objectives in this area. Testimony of Ms. Kernochan. The PPT began implementing the new reading goals and objectives while the Student was in the last month of first grade. Id.; and Exhibit P-40 at 1-2. The Student was progressing slowly to satisfactorily on the new goals and objectives within this first month of their implementation. Id.

47. The 2005-2006 IEP provided the Student with four hours per week of resource room instruction in reading with Ms. Kernochan and one hour of speech and language services per week. Exhibit P-38 at 8. This increase in the amount of resource room instruction for the Student was based upon both the increasing demands of the curriculum and concerns about the Student's ability to attend. Testimony of Ms. Kernochan. The increase in the number of resource room hours did not mean that the 2.5 hours per week the Student had received in first grade was insufficient for that year. Id. The remainder of the Student's program was delivered in a regular education second grade classroom, with non-disabled peers. Id.; and Testimony of Ms. Warner.

48. The Parents believed that the Board's IEP goals and objectives were not appropriate for the Student because they were not designed to get him up to grade level. Testimony of Mother. The Parents believed that the Board's attorney had questioned their qualifications, credentials, training, college degrees and their ability to provide the May 18, 2005 PPT with any meaningful recommendations regarding the provision of FAPE for the Student. Id.

49. The Parents wrote to the Board on July 31, 2005 regarding the May 18, 2005 PPT meeting and stated *inter alia* that the record was incomplete or inaccurate with respect to the concerns that they had presented; that the recommendations from four evaluation reports were not incorporated into the Student's IEP; that the IEP was developed without their input; that outstanding issues with respect to Dr. Free's recommendations for daily exercise were not addressed; that the Parents were not allowed to present their concerns to the PPT; that the present level of performance page was not accurate; and that they were concerned that the Board had low level expectations for the Student. Id.; and Exhibit P-43.

50. On August 15, 2005 the Parents wrote the Board and requested that it purchase *Books on Tape* for the Student's use in the silent reading period of his second grade classroom. Exhibit P-44. The Parents believed that *Books on Tape* would reduce the Student's frustration during the daily silent reading period due to his inability to read. Testimony of Mother. The Board denied that request. Id.

51. The Student had attended the Great Plain during the 2005-06 school year. Testimony of Mother.

52. On October 5, 2005 the Board convened a PPT meeting. Exhibit P-46. The Parents renewed their request for *Books on Tape* at that PPT meeting. Testimony of Mother. The Board had denied that request, but it was not recorded on the Prior Written Notice Page. Id.; and Exhibit P-46 at 3.

53. The Board refused the Parent's request to have Dr. Free's recommendation for daily exercise incorporated into the Student's IEP. Id.; and Exhibit P-46 at 2. The October 5, 2005 PPT continued the Student's May 18, 2005 IEP with the same goals and objectives and service hours. Id.

54. The Parents retained Robert S. Kruger, Ph.D., Clinical Psychology, to evaluate the Student to assess cognitive functioning and to make recommendations regarding appropriate interventions. Exhibit P-50 at 2. The Parents' perspective was that they wanted a credentialed person to provide a "second opinion" to help clarify things and because the Board's attorney had stated that the Parents did not have the proper training or credentials to make decisions regarding the Student's education. Testimony of Mother.

55. At no time prior to obtaining this evaluation did the Parents request that the Board fund an independent evaluation, or contest the findings of the Board's comprehensive evaluation conducted in the spring of 2004. Id. Although the Mother had several meetings with school staff, and attended one PPT that was convened at the Parents' request, between the time the Parents retained Dr. Kruger and the date they shared his report with the Board, the Parents never informed the Board about the evaluation. Id. The Board was made aware in December 2005 that the Parents wanted to bring Dr. Kruger to a PPT meeting. Exhibits P-48 and 49.

56. Dr. Kruger never observed the Student in the Board's program, contacted any member of the Board staff for input, inquired into the curriculum utilized by the Board, or reviewed any curriculum-based assessments of the Student, prior to issuing his report and recommendations. Testimony of Dr. Kruger; Ms. Kernochan; and Ms. Warner.

57. Although Dr. Kruger has no training or expertise in the area of speech pathology, among his recommendations was an increase in speech services. Exhibit P-50; and Testimony of Dr. Kruger. Dr. Kruger based his recommendations concerning speech services solely on the reports of Dorian Cundari, an outside speech evaluator retained by the Parents, whose reports he reviewed. Testimony of Dr. Kruger. He never contacted Ms. Cundari to discuss his recommendations with her. Id.

58. The Parents had provided Dr. Kruger with copies of evaluation reports, including the Board's May 2004 evaluations, PPT documents, educational records, report cards and health summaries for review in advance of his formal evaluation. Id.; and Testimony of Mother.

59. Dr. Kruger completed an evaluation report after assessing the Student over the course of five sessions during September, October and November 2005. Exhibit P-50. Dr. Kruger administered various standardized tests to assess the Student's cognitive, achievement,

neuropsychological, and phonological skills as reflected in his report. P-50. Dr. Kruger concluded that the Student's intellectual functioning was in the low average range. Id. at 2. He found that the Student did not recognize the letters x, y, h and q, misreading them as k, z, s and g. W. was "extremely distractible and inattentive although he is not generally hyperactive." Id. at 3. He found that W. was severely dyslexic and that compromised his ability to read, write, and spell; that he had significant dyscalculia with regard to written calculation; that he had significant attention and organizational issues; and that he had deficits with his academic skills. Dr. Kruger concluded that W. suffers from a "static encephalopathy (ICD-0 CM #742.9) which has resulted in a variety of cognitive impairments." Id. at 4.

60. Dr. Kruger's recommendations included significant revisions to the Student's IEP to improve his phonological processing and reading fluency, address inadequacies in math, address organizational and executive dysfunction deficiencies, add goals to address spelling and writing deficits. Id. at 5. Dr. Kruger also recommended that the Student's speech services be increased to daily services, and an intensive special education program consisting of at least three hours of daily instruction in a classroom setting containing few children to address the Student's reading, writing, spelling and math. Id. Dr. Kruger recommended that the Board provide this program in the Student's school, but if the Board was unable to provide that program, then placement at Kildonan School or Eagle Hill School should be considered. Id.

61. The Parents received a copy of Dr. Kruger's report on January 4, 2006, and provided the Board with a copy of that report on or about January 9, 2006. The Mother requested the Board to schedule a PPT meeting convenient for Parents, Dr. Kruger and their attorney's schedules. Exhibit P-51; and Testimony of Mother.

62. On February 22, 2006 the Board convened a PPT meeting. Exhibit P-54. Dr. Kruger and counsel accompanied the Parents to this meeting. Board counsel attended the PPT as well. Id. at 2. The school staff disagreed with the observations in the report, and had many concerns about the accuracy of it. Testimony of Mr. Manos; Ms. Kernochan; and Ms. Warner. Dr. Kruger's report noted that the Student had never been tried on prescription medications for distractibility, but did not analyze the impact that the Student's unmedicated state and the distractibility caused by his ADHD might have had on the testing he performed. Testimony of Mr. Manos; and Exhibit P-50 at 1.

63. The Board stipulated that it did not revise the Student's IEP in response to Dr. Kruger's evaluation. Dr. Kruger had offered to observe the Board's program, and the Mother wrote to Ms. Smith requesting dates for his visit. Exhibit P-55. The Board denied that request and advised the Parents' attorney on March 17, 2006. Exhibit P-57.

64. The PPT recommended a psychiatric evaluation at the February 22 meeting. They requested that the Parents consent to an evaluation by Dr. Joel Wolfson of cognitive, attention and emotional functioning. Id.; and Exhibit P-53. The Parents refused to sign the consent and requested Dr. John Gelinis perform an evaluation limited to the diagnosis of static encephalopathy. The Board agreed in the spirit of cooperation. Exhibit P-57.

65. On March 17, 2006, the Mother wrote to Ms. Warner regarding disagreements with the February 22 PPT meeting. She had provided the PPT with a copy of an occupational therapy (“OT”) evaluation by Karen Warhit, which wasn’t mentioned in the written prior notice and she wanted a reason why the PPT had refused an out-of-district placement and refused to change the IEP. Exhibit P-59. Ms. Warner replied to this letter and stated that the OT evaluation by Ms. Warhit would be considered at the PPT meeting when the psychiatric evaluation was available. Exhibit P-61.

66. The Board retained Dr. Gelinias and requested that he evaluate whether the Student had a diagnosis of Static Encephalopathy, anxiety, memory issues and attention as set forth in the Board’s letter dated March 31, 2006. Exhibit P-62. After receiving a copy of the letter to Dr. Gelinias, the Parents threatened to revoke their consent for Dr. Gelinias’ evaluation because the Board’s evaluation request had exceeded the scope of the Board’s original request and the Parent’s authorization to evaluate whether the Student had a diagnosis of Static Encephalopathy. Exhibits P-60, P-63, P-64 and P-66; and Testimony of Mother.

67. The Student was evaluated by Dr. Gelinias. On June 13, 2006 the Board convened a PPT meeting to review his report. Exhibit P-72. Dr. Gelinias participated in this PPT meeting via telephone and reviewed his evaluation report. Id. at 23 to 44; Testimony of Ms. Warner. Although the Board funded the evaluation and allowed it to go forward, it was of little or no use to the PPT due to the narrowness of the focus permitted by the Parents. Testimony of Mr. Manos. The only question that the Parents permitted Dr. Gelinias to answer was: “In reference to Dr. Kruger’s report (neuropsychologist), please evaluate the presence of the diagnosis of Static Encephalopathy. If this is a current diagnosis, what are the educational implications for W[.]?” Exhibit P-72 at 23. His answer to that question was that the term is not used by psychiatrists and that it may be synonymous with cerebral palsy. “W[.] possesses a multitude of neurocognitive weaknesses, as outlined above, that are reflective of his idiosyncratic and unique brain anatomy, physiology, and development. His difficulties clearly exceed those found in patients with even classic ADHD and comorbid learning difficulties. . . . While he can learn and is educable, he will require formidable and comprehensive and individualized educational programming and planning to assist him in making meaningful progress.” Id. at 44.

68. Dr. Gelinias’ report contained a diagnostic impression that included an expressive language disorder, ADHD, primarily inattentive type, reading disorder (dyslexia), mathematics disorder (dyscalculia), disorder of written expression (dysgraphia), cognitive disorder not otherwise specified (central auditory processing disorder, poor working memory and poor immediate recall), developmental coordination disorder (fine motor delays, gross motor delays and oral motor delays), anxiety disorder not otherwise specified (traits of generalized anxiety disorder and social anxiety disorder), sibling relational problem, academic problem and rule out nightmare disorder. Id. at 42.

69. Dr. Gelinias recommended an educational program to address the Student’s global cognitive difficulties by providing him with “a small minimally distracting classroom setting with a high teacher to student ratio (as well as perhaps a one on one paraeducator) in order to attend, process, and assimilate grade-level material. Inclusion in a distracting classroom setting

with a large number of students is inappropriate and less acceptable.” Id. at 43. Neither party called Dr. Gelinis to testify at the hearing.

70. The Student’s reading instruction in the resource room during his second grade year incorporated the Wilson Reading Program. Testimony of Ms. Kernochan. This program is a multisensory phonics-based reading program, based upon the Orton-Gillingham approach to decoding and phonics during his second grade year. Based upon the Student’s progress from prereading to an instructional level of 4 on the DRA during his first grade year, Ms. Kernochan believed that the Student would benefit from the Wilson Reading Program’s approach to decoding. Id. Susan Ratchford, who has a degree in special education and is specifically trained in the Wilson Reading program, worked with the Student in that program for one-half hour each day under the supervision of Ms. Kernochan. Id. Kildonan, the Parents preferred placement, uses the Orton-Gillingham reading program. Testimony of Mr. Lane.

71. Ms. Kernochan also worked with the Student directly for one-half hour each day, focusing on guided reading, as a second component of the Student’s second grade reading program. Testimony of Ms. Kernochan. Guided reading comprises work at a student’s instructional level, in the areas of accuracy, reading fluency, and comprehension. Id. While Ms. Ratchford’s work with the Student was designed primarily to address decoding skills, Ms. Kernochan’s time with the Student each day was designed to address fluency and comprehension. Id. Both components of the reading program were important to the Student’s continued growth in reading, as both decoding skills and sight word knowledge are necessary for a student to experience success and growth in reading. Id.

72. As she had during his first grade year, Ms. Kernochan sent home books at the Student’s independent reading level for him to read aloud, to reinforce her work with the Student and improve his fluency. Id. She also prepared and sent home a sight word ring, as she had during the previous year. Id. The Mother told Ms. Kernochan that she never utilized either strategy with the Student during his second grade year. Id.

73. The Student made significant progress on his goals and objectives during the 2005-2006 school year, his second grade year. His independent DRA level advanced from a level 3 at the beginning of the school year, to a level 6 in January and a level 12 in May, a significant improvement representing more than one year’s growth. Exhibit P-72 at 16; Testimony of Ms. Kernochan.

74. The Student also took the Danbury District Reading Assessment (“DDRA”) for his grade level on four occasions during the school year. The DDRA is a reading test administered to all students in Danbury. The Student received a score of 47% on the first administration, 70% on the second, 73% on the third and 77% on the fourth. Testimony of Ms. Kernochan. On all but the first administration, the Student received a passing score on a reading test given to regular education students. Id.

75. The Student’s word recognition skills improved over the course of his second grade year. In September 2005 the Student knew 58 of the first 100 high frequency words, while

in May 2006 he knew 98 of them. Id.; and Exhibit P-72 at 16. Ms. Kernochan was pleased with the Student's progress in word recognition and reading generally. Testimony of Ms. Kernochan.

76. The Student mastered every goal and objective in his 2005-2006 IEP. (P-72, pp. 46-50) This included mastery of the eight objectives under his reading goal, and made progress on them throughout the year. Id. at 46-48; and Testimony of Ms. Kernochan and Ms. Warner. He also mastered all of the three objectives under his communication goal. Exhibit P-72 at 49.

77. The Student's 2005-2006 IEP was appropriate, and he made meaningful educational progress that year in the least restrictive environment.

78. The June 13, 2006 PPT recommended continued placement at Great Plain for the 2006-2007 school year, the Student's third grade year. Id. at 2 and 14. The PPT also recommended a continuation of the special education and related services that the Student had received, reading instruction in the resource room and speech services. Id. Specifically, the Board recommended that the Student receive 7.5 hours of resource room instruction in reading each week. Id. Many of the goals and objectives for the Student's reading program for the 2006-2007 school year were based upon book 3 of the Wilson Reading program, as the Student had completed books 1 and 2. Testimony of Ms. Kernochan. The Student would have received 3 half-hour blocks of instruction in the resource room each day consisting of multi-sensory instruction in decoding/encoding, reading comprehension, and written language. Speech services would continue at one hour per week. Id. This increase in resource room services was appropriate in light of the increasing demands of the curriculum. Id.

79. The Board's 2006-2007 IEP permitted the Student to be educated with non-disabled peers for the majority of his school week (24 out of 32.5 hours), in his neighborhood school, yet still would have allowed the Student to receive specialized instruction in a resource room setting for part of each day in his areas of weakness. Paraeducator support was also added in the regular classroom during reading and writing instructional activities. Exhibit P-72 at 2 and 14.

80. The Parents requested an occupational therapy evaluation at the PPT, and the Board agreed to perform one. Id. at 2. On August 17, 2006, the Mother notified Ms. Smith that the Student would be attending Kildonan for the 2006-07 school year and requested that his school file be sent there. Exhibits P-77 and P-78; Testimony of Mother and Ms. Warner. Since the Parents enrolled the Student at the Kildonan, the Board did not complete the occupational therapy evaluation, which had been scheduled for August 31. Exhibit P-79; and Testimony of Ms. Warner.

81. The Parents sent a letter dated September 1, 2006, to Ms. Warner informing her that they rejected the IEP for the 2006-07 school year and placed the Student at Kildonan. They requested reimbursement for the costs of that placement and reiterated that the Student was available for an OT evaluation by Danbury. Exhibit P-80. The Board received the letter on September 8. The Board's attorney advised the Parents' attorney that a PPT meeting would be scheduled to consider the Parents' request for the Board to fund an out-of-district private placement for the Student. Exhibit P-81. The PPT was held on September 21, 2006 with both Parents. Their attorney did not attend. The Parents' request was denied. Exhibit P-83.

82. Kildonan is a boarding and day school for children with dyslexia in grades two through twelve located in Amenia, New York, approximately one hour from Danbury. Exhibit P-87; and Testimony of Dr. Lane. The Student spends approximately two hours in transit to and from the school each day. Testimony of the Mother. There are no non-disabled students in attendance at Kildonan, and no opportunities for the Student to interact with non-disabled peers at any time during his school day there. Testimony of Dr. Lane.

83. Kildonan is chartered by the State of New York and is authorized to issue high diplomas. Id. In addition, the school is accredited by the New York Association of Independent Schools and by the Orton-Gillingham Practitioner Educators. Id. Most of the teachers at Kildonan are licensed in New York and/or Connecticut and all teachers receive ninety (90) hours of Orton-Gillingham training that is specifically designed to teach language skills to students with language based learning disabilities, in addition to receiving other professional development. Id. Kildonan is not certified as a special education school by the State of New York. Id. There are no speech and language services offered to the Student or anyone else at Kildonan, and no speech and language pathologist on staff there. Id.

84. Dr. Robert Lane, the Academic Dean of Kildonan, has a Masters of Arts Degree in Learning Disabilities, a Doctorate of Education and is certified as a Special Education Teacher in New York and certified as a Learning Disabilities Teacher Consultant in New Jersey. Id.

85. Dr. Lane did not know the ages of the other students in the Student's classes there, but testified that they were not all the same age as the Student. The second and third grades are combined in one class because of the small numbers of students. Id. He did not know the credentials of all the instructors working with the Student. Id. The Student's teacher for literature, social studies and science, Ms. Whelan, is a certified elementary education teacher in Connecticut. Id.

86. The Student spends 45 minutes each school day engaged in horseback riding at Kildonan. Id. He also spends a minimum of fifteen minutes per day in a large group music experience; on some days, this can last up to a half hour. Id. The Student also participates in other nonacademic exercises each day, including 45 minutes in "movement science." He also receives a significant portion of instruction each day in a study hall, conducted in a hallway with a total of sixteen students receiving tutoring in the same space at the same time. Id. Mr. Lane was unable to describe the Student's schedule at the School in detail, and could not state how much of the Student's day was spent on academics. Id. He did not know whether the Student was receiving medication for his ADHD. Id.

87. There are no written tests or quizzes at Kildonan in any area other than math. Id. The rest of the assessments conducted at the school are project-based, and often done in groups. Id. Progress report grades are B (Beginning), D (Developing) and S (Secure). Dr. Lane could not describe how or whether the grading system at Kildonan is standardized across disciplines, courses and teachers. Id.; and Exhibit P-85. There are no specific academic goals that are measured on the Kildonan grading system. Other than general comments by the teachers and Dr. Lane, it is difficult to determine whether the Student improved in any area between October 2006 and June 2007. Id.; and Exhibits P-88, P-90 and P-92.

88. The Student's progress notes from Kildonan indicated that the Student experienced behavioral difficulties in a number of his classes there. Id. Kildonan did not collect any baseline data regarding the Student's behavior and Dr. Lane could provide no objective basis for belief that the Student's behavior had improved over the time he has been enrolled there. Testimony of Dr. Lane.

89. There was no testimony to appropriately interpret the testing performed by Kildonan in October 2006 and May 2007. Exhibit P-89. Dr. Lane did not know the margins of error for any of the tests performed, could not explain why the report reflected that the same form of the Math Skills Test was given on both occasions, could not explain why the GORT was given only in May, and did not explain why the Student's percentile scores declined in the areas of word identification, copying speed, and computation. Id.; and Testimony of Dr. Lane.

90. The Student did not receive direct OT or speech and language instruction from Kildonan during the 2006-07 school year. Testimony of Dr. Lane and Mother. He would have to receive it in the summer because there was insufficient time to arrange such services after school due to the length of the Student's school day, which including travel time was approximately ten hours. Testimony of Mother.

91. Dr. Kruger did not believe that the Student's 2006-07 IEP was appropriate because it contained a large portion of "mainstream" instruction rather than the intensive program of instruction that he had recommended in his report including a small student teacher ratio that did not exceed 1:8, and it did not contain the three hours per day of intensive instruction or at least 18.5 hours per week of special education and related services. Testimony of Dr. Kruger. Further, Dr. Kruger believed that the 2006-07 IEP was not appropriate because it did not contain any OT services or sufficient speech and language service hours. Id.

92. Dr. Kruger had completed his original evaluation in October and November 2005. Exhibit P-50. He completed an updated psychoeducational assessment during April 2007. Exhibit P-91; and Testimony of Dr. Kruger.

93. Dr. Kruger reviewed the Board's June 13, 2006 IEP and teacher reports as part of his updated assessment. In addition, he reviewed materials from Kildonan and spoke with Dr. Lane and obtained information regarding the Student's program. Testimony of Dr. Kruger.

94. Dr. Kruger found that some of the Student's WIAT achievement scores had changed between his original evaluation; Exhibit P-50; and his April 2007 assessment; Exhibit P-91; and concluded that the Student had made some progress in reading, decoding, and he continued to experience difficulty with phonological processing, math computation and spelling. Id.

95. The Board never received the updated report presented by Dr. Kruger at the hearing until just four days prior to his testimony when it was provided to Board counsel. Id. It was never discussed at a PPT, nor was it considered in the development of the Student's 2006-2007 IEP. Dr. Kruger's comparisons of the raw scores from his fall 2005 testing to his spring 2007 testing simply reflected the growth in raw scores one would anticipate as a student ages.

Testimony of Mr. Manos. If a student's raw scores do not increase as he or she ages, his or her standard scores will actually decline. Id.

96. There are no non-disabled students at Kildonan. Testimony of Mr. Lane. The Student benefits from interacting with typical peers. Testimony of Ms. Capone. The program offered by the Board gives the Student access to typical peers in both academic and social situations. Id.; and Testimony of Mr. Manos and Ms. Warner.

CONCLUSIONS OF LAW

1. The Parties agree that the Student qualifies for and is entitled to receive a free and appropriate public education ("FAPE") with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq. The Parties also agree that W. is a child with other health impairment (ADHD). 34 C.F.R. Section 300.8(c)(9).

2. The IEP serves as the centerpiece of a student's entitlement to special education under the IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). The primary safeguard is the obligatory development of an IEP which must contain a statement of the child's current educational performance, including how his disability affects his involvement and progress in the general curriculum, and a statement of "measurable annual goals, including benchmarks or short term objectives related to meeting the child's individual needs." 20 U.S.C. Section 1414(d)(1)(A)(ii); 34 C.F.R. Section 300.320; Roland M. v. Concord School Committee, 910 F.2d 983, 987 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991). In developing an IEP, the PPT must consider the strengths of the child, the concerns of the parent, the results of the most recent evaluations, any results from district assessments, and whether the student requires any assistive technology devices and services. See 34 C.F.R. 300.324. Courts must also consider whether the program is "individualized on the basis of the student's assessment and performance" when determining the appropriateness of an IEP. See A.S. v. Board of Education of West Hartford, 35 IDELR 179 (D. Conn. 2001), aff'd, 47 Fed. Appx. 615 (2d Cir. 2002) (citing M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ., 122 F.Supp.2d 289, 292 n.6 (D. Conn. 2000)).

3. The standard for determining whether FAPE has been provided is set forth in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have been met and second is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-207. The Parents, as the party who initiated the due process proceedings, have the burden of going forward with the evidence. The Board bears the burden of proof on the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence. Regulation of Conn. State Agencies Section 10-76h-14(a). Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998).

4. As for the first prong of the Rowley inquiry, whether the school district complied with the procedural requirements of the IDEA, there are two areas of dispute. The Parents claim that their rights to participate in PPT meetings were violated and that they did not receive timely notice of the Student's IEPs following the May 18, 2005 and June 13, 2006 PPT meetings. They allege receipt of the notices on June 1, 2005 and June 25, 2006 respectively. "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-- (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit." 34 CFR Section 300.513(a)(2).

5. As to the first claim, the Parents attended every PPT meeting during the relevant time period from March 12, 2005 through September 21, 2006. They were represented by counsel at all the PPT meetings except the September 21, 2006 PPT meeting. The evaluations obtained by the Parents from the Yale Child Study Center, Dr. Alshansky, Dorian Cundari, Dr. Kruger and Karen Warhit and the letter from Dr. Free were reviewed by the members of the PPT. The Parents' concerns were considered. The mandate in IDEA that the IEP team "considers" the concerns of the Parents does not require that it adopt whatever changes the Parents request. A.E. v. Westport Board of Ed., 46 IDELR 277 (D. Conn. 2006). As required by the IDEA, the Board reviewed W.'s needs at various PPTs on an individualized basis at appropriate intervals. The Board complied with 34 C.F.R. Section 300.324(a)(1)(ii). See also T.S. v. Ridgefield Board of Education, 808 F. Supp. 926 (D. Conn. 1992)(requirement of consideration met where one member of the PPT read a portion of the evaluator's report).

6. As to the second claim, the IDEA requires prior written notice to the Parents within a "reasonable time" before the agency takes any proposed or refuses to take any action as set forth in 34 CFR Section 300.503. Section 10-76d-13 of the Regs. Of Conn. State Agencies requires notice with five days following the PPT meeting. The Parents' counsel acknowledges in his Conclusion of Law, paragraph 55 that these one-week delays did not deprive the Student of an educational benefit. There is no basis to conclude that the notices were not received within a reasonable time, therefore, there was no violation of IDEA. Similarly, the receipt after the five days required by the Conn. Regulation did not result in a denial of FAPE.

7. The second prong of Rowley requires a finding that the IEP is "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, supra, 206-207. The IDEA requires only that school districts provide an 'appropriate' IEP, gauged by whether the IEP is 'sufficient to confer some educational benefit.'" Id., at 200. In this Circuit, the Court of Appeals has said that the proper gauge for determining educational progress is "whether the educational program provided for a child is reasonably calculated to allow the child to receive 'meaningful' educational benefits." Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1120 (2nd Cir. 1997). An appropriate public education under IDEA is one that is likely to produce progress, not regression. Walczak, supra. "Of course, a child's academic progress must be viewed in light of the limitations imposed by the child's disability." Mrs. B. v. Milford Board of Education, supra at 1121. The Court of Appeals has also cautioned that meaningful educational benefits are "not everything that might be thought desirable by loving parents." Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563, 567 (2nd Cir. 1989). "Clearly, Congress did not intend that a school system could discharge its duty under the [IDEA]

by providing a program that produces some minimal academic advancement, no matter how trivial." Hall v. Vance County Bd. Of Educ., 774 F.2d 629,636 (4th Cir. 1985). With these principles in mind, the IEPs at issue were appropriate to provide the Student with meaningful educational benefits.

8. The evidence in this hearing shows that the Board conducted comprehensive evaluations and assessments of the Student's current levels of performance in cognitive, academic, medical, social/developmental, speech/language and classroom update in the spring 2004. The IEP developed at the June 7, 2004 PPT meeting was appropriate. The Parents did not challenge the goals and objectives at the PPT meeting. The Student's eligibility was changed from speech or language impairment to other health impairment in accordance with the evaluation by Dr. Alshansky and the diagnosis of ADHD. The Student received educational benefit from the IEP, which was implemented at Great Plain. Similarly, the IEP developed at the May 18, 2005 was appropriate. It was based on the Student's performance on the 2004-05 IEP and the reports and recommendations of his teachers and speech pathologist. The Student received educational benefit from the IEP, which was implemented at Great Plain. The IEP developed on June 13, 2006 was also appropriate. It was based on the Student's performance on his 2005-06 IEP and the recommendations of his teachers and speech pathologist, the health report from the school nurse and the outside evaluation by Dr. Gelinis. Notably, at that time, the Parents did not request an outplacement. In September 2006, the PPT appropriately denied the outplacement request because an appropriate program at Great Plain was offered. The fact that Kildonan's program might offer more benefits does not render the Board's IEP inappropriate.

9. IDEA also requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled. Board of Education of the Hendrick Hudson Central School District v. Rowley, supra., 181; 34 C.F.R. Section 300.114(a). See also 20 U.S.C. Section 1412(5)(b); 34 C.F.R. Sections 300.114 through 300.120; Conn. State Regs. Sections 10-76a-1 and 10-76d-1. School districts must evaluate whether a student can be educated in a regular classroom if provided with supplemental aids and services, and a full range of services must be considered. Oberti v. Board of Education, 995 F.2d 1204, 1216 (3d Cir. 1993). The district must examine the educational benefits, both academic and nonacademic, to the student in a regular classroom. Among the factors to be considered are the advantages from modeling the behavior and language of non-disabled students, effects of such inclusion on the other students in the class and the costs of necessary supplemental services. Id. "Least restrictive environment" is defined as follows under IDEA:

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

20 U.S.C. Sec. 1412(a)(5); 34 C.F.R. Sec. 300.114(a). FAPE must be provided to disabled children "in the least restrictive appropriate environment." Polera v. Bd. Of Educ., 288 F.3d 478, 481 (2d Cir. 2002).

10. In this case the Student was educated in the public schools in his home district of Danbury from kindergarten through second grade. Section 300.116(b) provides: "The child's placement—(1) is determined at least annually; (2) is based on the child's IEP; and (3) is as close as possible to the child's home." In this case, the PPT developed an IEP for the Student for third grade at his home school, which provided for special education in a resource room. The remainder of his school day is provided in the mainstream with the assistance of an aide when working on reading and writing activities in the regular classroom. He was also provided with related services of individual speech-language therapy in a resource room. The Parents claim that the Student made insufficient progress in his IEPs in first and second grades because he wasn't reading at grade level. This is belied by the substantial evidence in the record from W.'s teachers and related service providers that he did make progress. There was no evidence in the record that given the nature and severity of his disability, the Student could be expected to read at grade level. He made one year's worth of growth in each of the school years at issue.

11. The Board's programs offered the right balance between special education and regular education. R.L. by Mr. and Mrs. L. v. Plainville Bd. of Ed., 363 F.Supp.2d 222 (D.Conn. 2005):

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. LEXIS 1655, (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.

There is substantial evidence in the record that the Student does not require an out-of-district private placement in order to be educated.

12. When determining the appropriateness of a given placement, courts will also consider evidence of a student's progress in that placement. An appropriate education must provide opportunities for more than "mere trivial advancement." Mrs. B. v. Milford Bd. of Educ., 103 F.3d 114, 1121 (2nd Cir. 1997). However, an appropriate education is "not one that provides everything that might be though desirable by loving parents." Tucker v. Bay Shore Union Free School District, 873 F.2d 563, 567 (2nd Cir. 1989). Moreover, the Second Circuit has made clear that any advancement or progress by the student must be "viewed in light of the limitations imposed by the child's disability." Mrs. B., 103 F.3d at 1121. The progress W. has made in the Board's programs, particularly when considering the significant limitations on learning imposed through his disability, is more than trivial and establishes the appropriateness of his program. In fact, the Board witnesses with whom W. has worked testified that W. made considerable progress in gaining academic, speech and other skills during his three years at Great Plain, despite his cognitive and attentional issues.

13. Given the appropriate program offered by the Board, the Hearing Officer need not evaluate the appropriateness of the Parents' preferred placement at Kildonan. See Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985); Florence Cty. Sch. Dist. v. Carter, 114 S.Ct. 361 (1993). See also In the Matter of Student with Disability, 33 IDELR 263 (SEA CT 2000) ("it is well established that if it is determined that a local school district can provide a FAPE for a student, it is not relevant that the private placement's program is appropriate, better than, different from that proposed by the district or preferred by the parent.")

14. The Parents claim that the Board was obligated to conduct an occupational therapy evaluation on the Student because it offered to do so at the June 13, 2006 PPT meeting and the Parents signed the consent form. The Board claims it is not obligated because the Parents withdrew the Student from the Danbury Public Schools and placed him unilaterally in a private school located outside of the City of Danbury prior to the date of the evaluation, which was scheduled for August 31, 2006. The Parents did not send the Student to the Danbury Public Schools for a single school day during the 2006-2007 school year. "Each LEA must locate, identify and *evaluate* all children with disabilities who are *enrolled by their parents* in private, including religious, elementary schools and secondary schools located in the school district *served by the LEA*. . . " 34 C.F.R. Section 300.131 (emphasis added). Pursuant to the applicable regulation, once the Parents enrolled the Student at Kildonan, the LEA in which Kildonan is located, Amenia, New York, became responsible for evaluating the Student. The Parents rely on 20 U.S.C. Section 1412(a)(10)(B) (2004 rev.); and 34 C.F.R. Section 300.148 for the proposition that the provisions of 20 U.S.C. Section 1412(a)(10)(A)(i) (2004 rev.); and 34 C.F.R. Section 300.130 *et seq.* (2006 rev.) are only applicable to private placements when FAPE is not at issue. A reading of the definition of "Parentally-placed private school children with disabilities" in Section 300.130 exempts children covered under Sections 300.145 through 300.147. The Parents' argument that Section 300.130 does not apply to them because of 34 C.F.R. Section 300.148 fails. In light of the Parents' enrollment of the Student in a private school in New York, the Board properly declined to conduct the occupational therapy evaluation.

15. The Parents are requesting an award of compensatory education for the Board's alleged "repeated refusal to consider the Parents' input for the enhancement of the Student's education." Compensatory education has been recognized as an available remedy under the

IDEA for the failure to provide a free appropriate public education. *See, K.P. v. Juzwic*, 23 IDELR 5, 891 F.Supp. 703 (D.Conn. 1995); *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated*, 492 U.S. 902 (1989), *reaffirmed*, 888 F.2d 258 (2d Cir. 1989); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990). Moreover, most courts have characterized an award of compensatory education as an “equitable remedy” (*see, Burlington v. Dept. of Educ.*, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed*, 471 U.S. 359 (1985)), and have awarded compensatory education such as tuition reimbursement only where a school district “flagrantly” fails to comply with the requirements of IDEA, or commits what may be characterized as an “egregious” violation. *Carlisle Area Sch. Dist. v. Scott P.*, 23 IDELR 293, 62 F.3d 520 (3d Cir. 1995); *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990), *cert. denied*, 499, U.S. 923 (1991) (compensatory education awarded where district took more than 30 months to provide an appropriate placement while admitting that the in-district program was not appropriate). The Second Circuit has explicitly required a “gross” violation of IDEA as a prerequisite to an award of compensatory education, at least as it pertains to claimants over the age of 21 at the time of the institution of the claim. *Garro v. State of Connecticut*, 23 F.3d 734 (2d Cir. 1994) (student was denied all access to educational services until the age of 21); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (gross violation examples include undue delay in holding hearings, taking advantage of mental infirmity to deny a placement). There were no gross or egregious violations of IDEA in this case which would warrant an award of compensatory education.

FINAL DECISION AND ORDER

1. The program proposed by the Board on June 7, 2004 for the 2004-2005 school year at Great Plain School provided the Student a free appropriate public education in the least restrictive environment for the relevant period from March 12, 2005 to the end of the school year.

2. The program proposed by the Board on May 18, 2005 for the 2005-2006 school year at Great Plain School provided the Student a free appropriate public education in the least restrictive environment.

3. The program proposed by the Board on June 13, 2006 for the 2006-2007 school year at the Great Plain School offered the Student a free appropriate public education in the least restrictive environment.

4. There is no need for a determination as to whether Kildonan School is an appropriate placement for the Student.

5. The Board is not financially responsible for a private placement of the Student at Kildonan School in Amenia, New York for the 2006-2007 school year.

6. The Board was not required to conduct an occupational therapy evaluation of the Student after his Parents enrolled him at Kildonan.

7. The Parents are not entitled to compensatory education for the Student for any period of time.