

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. North Haven Board of Education

Appearing on behalf of the Parents: Atty. David C. Shaw, Law Office of David C. Shaw, 34 Jerome Avenue, Bloomfield, CT

Appearing on behalf of the North Haven Board of Education: Atty. Linda L. Yoder, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

The Parents submitted the following issues for the hearing:

1. Whether the IEP for the 2006-2007 school year was appropriate?
2. Whether the Board failed to consider placing the Student in regular classes (i.e. educating her with non-disabled students 80% or more of the school day) with adequate supplementary aids and services and modifications to the general education curriculum and/or removed her from regular classes when she could have been educated in such a setting with supplementary aids and services and modifications to the general education curriculum during the 2006-2007 school year in violation of 20 U.S.C. Section 1412(a)(5)(A)?
3. Whether the IEP for the 2007-2008 school year was appropriate?
4. Whether the Board failed to consider placing the Student in regular classes (i.e. educating her with non-disabled students 80% or more of the school day) with adequate supplementary aids and services and modifications to the general educational curriculum and/or removed her from regular classes when she could have been educated in such a setting with supplementary aids and services and modifications to the general education curriculum during the 2007-2008 school year in violation of 20 U.S.C. Section 1412(a)(5)(A)?
5. Whether the Board violated the Parents' and Student's procedural rights under the IDEA and, as a result, deprived the Student of a free appropriate public education ("FAPE") in one or more of the following respects:
 - a. By making a decision to expel and/or change the educational placement of the Student before a PPT meeting was held and a manifestation determination was made?
 - b. By advising the Parents immediately after the Student's suspension on November 2, 2007 that she would not be permitted to return to the North Haven Public

Schools and that they had only the following two choices with respect to the Student's placement: expulsion or placement in an out-of-district placement.

The Board submitted the following supplemental issues:

6. Is an out-of-district placement required to provide the Student with a FAPE?

7. If an out-of-district placement is not required at this time to provide the Student with a FAPE, what is the least restrictive environment ("LRE") in which the Student can receive an appropriate educational program and what modifications if any must be made to the current IEP to provide the Student with a FAPE in that environment?

SUMMARY

The Student (also referred to as L.) is a 12 year-old student who, until November 2, 2007, attended 5th grade in one of the Board's elementary schools. On November 14, 2007, a manifestation determination planning and placement ("PPT") meeting was held, which determined that the behavior on November 2 was a manifestation of her disability. The PPT recommended an out-of-district placement for the Student at one of several private schools. The Parents disagreed and, on November 15, filed this due process complaint to establish that L. can be educated in regular classes with appropriate supplementary aids and services, which they argue the Board has not provided in the last two school years. The Board contends that it has provided the Student with a FAPE for both school years and that the Student requires an out-of-district placement in order to be educated in a safe manner and to modify her unsafe behaviors so that she can attend the public middle school for the 2008-09 school year. Since the case was filed, the Student has been in a homebound placement and is receiving limited educational services, as well as occupational and physical therapy by agreement of the parties as a stay-put placement.

PROCEDURAL HISTORY

The Parents' attorney requested this hearing by faxing a letter to the State Department of Education (SDE) on November 15, 2007. Hearing Officer (HO) Exhibit 1. The Board received a copy on that date. This Hearing Officer was assigned to the case on November 16, 2007. The Board's attorney filed an appearance on November 26. The Parents' attorney filed an appearance on November 27. A prehearing conference was held on November 28. The attorneys reported that a resolution meeting had not been scheduled. The attorneys were unsure if mediation would be agreed on. The mailing date of the final decision was established as January 31, 2008. Hearing dates were agreed on for December 19, January 3, 7 and 10. Following the prehearing conference, the Parents' attorney requested that the December 19 hearing date be canceled because of commitments on another case. A hearing notice was issued for the January dates and the parties were directed to file witness lists and exhibits by December 27. On December 13, the Parents' attorney requested that the January 3 hearing be canceled so that the parties could conduct a mediation on that date. The request was granted. On December 31, the Parents' attorney requested that the date for filing exhibits and witness lists be extended to January 4, which was granted. On January 4, the Parents' attorney requested that the January 7 hearing be canceled so that the parties could continue settlement discussions. The request was granted and the mailing date for the final decision was extended to February 4, 2008. The

Parents filed Exhibits P-1 through P-234 and their witness list on January 4. The Board filed its witness list, but no exhibits, on that date.

The hearing convened on January 10. A discussion to clarify the issues was held off the record as well as to schedule additional hearing dates. The Parents' attorney agreed to file a more specific statement of the issues, which he did on January 14. Additional hearing dates were agreed on for February 12, 15 and 25 and March 4, 6, 10 and 12. The mailing date for the final decision was extended to April 7, 2008. The Board did not object to any Parent exhibits. All were entered as full exhibits. The attorneys presented opening statements. The Parents then presented direct testimony from the Mother for the remainder of the day. On January 16, the Parents' attorney requested that the hearing on March 6 be canceled because of another commitment. The request was granted, March 20 was added as a hearing date and the mailing date for the final decision was extended to April 14.

The hearing continued on February 12. The Parents offered new exhibits P-235 through P-237, which were admitted without objection. The Board's attorney requested an opportunity to file a counterstatement of the issues, which was granted. The Parents were permitted to file objections to the Board's statement of issues. The Parents presented direct testimony from Ann Majure, Ph.D., special education. On February 14, the Board filed its counterstatement of issues. Exhibit HO-2. The hearing continued on February 15. The Parents filed an objection to the Board's counterstatement of issues. The Board's counterstatement was allowed. The Parents were given the opportunity to offer closing argument concerning why those issues should not be considered. The hearing continued with the completion of Dr. Majure. The Mother continued her direct testimony. The hearing continued on February 25 with testimony from Judy Itzkowitz, Ph.D., special education. Her curricula vita ("CV") was admitted as Exhibit P-238.

On March 3, the Board's attorney requested a cancellation of the March 4 hearing because of personal illness. The request was granted. The hearing continued on March 10 with the completion of testimony from the Mother. The Parents rested their case. An additional hearing date was agreed on April 11 and the mailing date for the final decision was extended to May 5. On March 11, the Parents' attorney requested a cancellation of the March 12 hearing because of a medical emergency. The request was granted.

On March 14, the Board filed Exhibits B-1 through B-3 and a supplemental witness list. On March 19, the Parents' attorney filed an objection to all the Board's exhibits. The hearing continued on March 20. The Board began its case by offering the exhibits through the testimony of Mary Van Deun, Director of Student Services. The Parents' attorney's objection to her testifying was overruled. Exhibits B-1 through B-3 were admitted into evidence during Ms. Van Deun's testimony. The Parties agreed to add May 2 as a hearing date and to extend the mailing date for the final decision to May 27, 2008. The hearing continued on April 11 with Ms. Van Deun's testimony. Additional hearing dates were agreed on for May 14 and 19 and the mailing date for the final decision was extended to June 12, 2008.

On April 15, the Parents' attorney filed Exhibits P-239 through P-250. The hearing continued on May 2 with discussion of the new exhibits. The Parents' attorney filed Exhibit P-251 at the hearing. The Board had no objections to Exhibits P-243, P-247, P-248 and P-250, which were admitted as full exhibits. After argument from both attorneys, Exhibits P-239 through P-242 and P-244 through P-246 were excluded from evidence. Exhibits P-249 and P-

251 were admitted into evidence over the Board's objection. Ms. Van Deun completed her testimony. On May 9, the Parents' attorney filed a supplemental witness list. The Board's attorney did not appear at the May 14 hearing because of personal illness. The hearing was cancelled. The Parents' attorney filed Exhibits P-252 and P-253. On May 16, the Board's attorney requested that the May 19 hearing be canceled because of personal illness. The request was granted. Additional hearing dates were agreed on for June 13 and 17 and the mailing date for the final decision was extended to July 11, 2008. On May 28, the Parents' attorney filed another supplemental witness list.

The hearing continued on June 13. Exhibits P-252 and P-253 were admitted into evidence. The Board offered additional Exhibits B-5 and B-6. The Board presented testimony from Donn Sottolano, Ph.D., school psychology. His CV was admitted as Exhibit B-5. Exhibit B-6 was admitted into evidence over the Parents' objection during the testimony of Dr. Sottolano. The Parents were allowed to present rebuttal testimony from Theresa DeFrancis from the SDE before the Board rested its case because she was subpoenaed to appear and was not available on June 17. The Board objected to rebuttal testimony from Eileen Luddy, Ph.D. The objection was overruled and each side was permitted one hour to question Dr. Luddy. The hearing continued on June 17 with testimony from Dawn Hoskins, speech and language pathologist employed by the Board. Ms. Hoskins' CV was admitted as Exhibit B-7. The Board withdrew Exhibit B-4, which had never been offered into evidence. The Board rested its case. The Parents presented rebuttal testimony from Dr. Luddy and the Mother. Dr. Luddy's CV was admitted as Exhibit P-254. Both parties rested.

The parties requested time to file briefs. The attorneys were asked to present the briefs in a format of proposed of fact, conclusions of law and order, along with any separate legal argument they wished to make. The Parents' brief was due on July 28. The Board's brief was due on August 18. The Parents' reply brief was due on August 29. The decision deadline was extended to September 22, 2008 by agreement of the parties. The Hearing Officer sent the attorneys a letter on June 18 confirming these dates. The briefs were timely filed. On September 22, the Hearing Officer advised the Parties that additional time was needed to complete the decision.

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 November 14, 1995, is 12 years old and has been in the Board's public schools since November 17, 1998. Exhibit P-17; and Testimony of Mother.

2. L. has mental retardation, secondary to Down syndrome. Exhibit P-39. In the preschool program she was initially classified as "uncategorized," then as Down syndrome and then as developmental delay. Exhibits P-22, P-31, P-41, P-44, P-52, P-54 and P-55.

3. In December 2000 and January 2001, the Parents had L. evaluated by Laurie Cardona, Psy.D., of the Yale Child Study Center. Exhibit P-49. The Parents noted their concerns regarding L.'s oppositionality and task refusal. Id. at 5. Parents and teaching staff had concerns with her variable attention and compliance. In situations with transitions, new learning experiences, changes in routine and unstructured activities, she "generally responds with maladaptive behaviors such as: refusals, attempts to flee the situation, crying or tantrums, dropping or throwing objects, dropping herself to the floor and refusing to move." Id. at 2. Dr. Cardona conducted various testing and a classroom observation. She concluded that L. "is a five-year old girl whose current cognitive, social and adaptive functioning is significantly delayed. . . . Her general cognitive functioning appears to fall within the Mild to Moderate range of mental retardation." Id. at 7; and Testimony of Mother. Dr. Cardona attended a PPT meeting on March 1, 2001, and discussed her report with the team. Exhibit P-52. Phil Colston, the Board's administrator at the PPT meeting, was to research possible placement options for the next year and provide the family with a list of schools and contact names. Id.

4. On March 28, 2001, the PPT met to discuss progress on the Parents' visits to out-of-district placements. It was noted that "significant behavior is impacting L[.]'s continued progress in the pre-K program." Exhibit P-55.

5. On June 12, 2001, the PPT agreed on a classification of Intellectual Disability. Exhibit P-60 at 1; and Testimony of Mother. The team agreed that L. would attend the Special Needs Kindergarten at a District elementary school. Id. The team also agreed to hire a behavioral consultant. Exhibit P-60 at 2.

6. The November 2001 Triennial Evaluation evaluated L. in a variety of areas. The occupational therapist from ACES reported L.'s progress. Exhibit P-66. Ms. Hoskins' speech and language evaluation noted slow, steady progress. She also commented on a notable decrease in L.'s falling or "plopping" on the floor. Exhibit P-67 at 7 and 9. The school psychologist, Joan Falcigno, conducted a behavioral evaluation. Id. at 10-13. The only behaviors of clinical significance at that time were attention and atypicality. Overall behaviors fell within the at-risk range. Id. at 12. "Though these behavioral difficulties appeared to be due in part to her limited cognitive ability, low physical stamina and communication difficulties, they will require intervention." Id. at 14. "Behavioral difficulties may result from frustration and fatigue." Id. at 15.

7. The Parents requested that the Board retain a behavior consultant from Futures, Inc. Exhibit P-94. The Special Education Supervisor, Mr. Colson, contacted the organization. Exhibit P-95. A PPT meeting was convened on April 30, 2002 to discuss, among other things, a

behavior evaluation by Kathy Wickham, Director of Futures, Inc. Exhibit P-97. The Parents signed a consent for information to be exchanged with Ms. Wickham. Exhibit P-96. They also signed a consent for information to be exchanged with the Foundation School. Exhibit P-97 at 31.

8. A Behavior Support Plan was developed in June 2002 as a collaborative process between Futures Inc. and the school system, which targeted the behaviors of flopping to the floor, wailing or crying “No” and abruptly leaving the group. Exhibit P-74.

9. At the June 5, 2002 PPT meeting, the team recommended placement in regular Kindergarten with special education support for the 2002-2003 school year. Exhibit P-101. L. completed the Special Needs Kindergarten in June, but she was not ready to go into the 1st Grade. Testimony of Mother.

10. In Kindergarten L. would receive 31.25 hours per week of special education support, with 2.5 hours in the Special Needs Kindergarten. The team reviewed the behavior plan and proposed implementing it. The Parents were asked to visit Foundation School as a possible outplacement. Exhibit P-101. The Parents requested and were refused 3 hours per week of speech therapy. The speech and language pathologist believed one hour per week was sufficient. Id. at 3.

11. On November 11, 2002, Elizabeth Howe wrote a Behavioral Observation Report after observing positive and negative behaviors on October 21, 23 and 28, 2002. Exhibit P-81. Of 163 behaviors observed, 81 were positive and 82 were negative. Id. Another Behavior Support Plan was developed in November 2002, which added a fourth target behavior—hitting, spitting or kicking. Exhibit P-79.

12. In March 2003, the Parents requested a PPT meeting to discuss L.’s progress. Exhibit P-103. The meeting was held on March 18, 2003. Exhibit P-88. The Parents requested an independent behavioral educational consultant to help plan for L.’s 1st grade program and for a Functional Behavioral Assessment. Id. at 2. They also requested an increase in speech therapy. The time was increased by one half hour a week. Id. at 3.

13. On March 26, 2003, the Parents wrote two letters to the school to clarify the discussions at the March 18, 2003 PPT meeting. They explained they had requested an Independent Educational Evaluation and a Functional Behavioral Assessment (“FBA”) because L.’s behaviors interfered with learning, and they hoped the evaluations could design a behavior program and any continued modifications as needed. Exhibit P-90.

14. Nancy Shuster of ACES provided an Assistive Technology (“AT”) Assessment on March 22, 2003. Exhibit P-89. This was done as a result of the Parents’ request. Testimony of Mother. Ms. Shuster found that: “this student’s primary interfering factor during this assessment was her behavior, which impeded the appropriate use of assistive technology and her consistent and appropriate participation in educational activities.” Id. at 7. She thought that the Student’s behavior needed to be managed before she could benefit from AT. “If not used appropriately, the technology will only become a target for inappropriate behavior and the student’s non-compliant behavior will interfere with the potential educational benefits of assistive technology for L[.]” Id. Her second suggestion was to obtain Clicker 4 software with

Mayer-Johnson PCS symbols and Animation add-on as part of multiple and varied media activities. Id. at 7-9. Next she suggested as low technology strategies a Talking Picture Album, Howbrite's Junior 20 MathLine, a legal-sized clipboard with a non-slide surface adhered to the underneath side and an appropriate desk/table height. Id. at 10-11.

15. On March 27, 2003, a PPT meeting was convened and recommended that behavioral and educational evaluations be completed by school staff. Exhibit P-106. The team rejected the Parents' request for an independent evaluation. The school felt assessments by the staff were sufficient to evaluate L.'s progress and develop an educational plan. Id. at 3.

16. Lisa Jones from Benhaven Learning Network observed L. on May 22, 2003 in her Kindergarten classroom. Ms. Jones recommended that a consultant work with the special education teacher for the first three weeks of school to develop educational and behavioral programs for L. Exhibit P-116.

17. The PPT met on June 10, 2003 to conduct an annual review, develop an IEP for 1st grade and to review Ms. Shuster's AT assessment. Exhibits P-111 and P-112. The IEP developed on June 10, 2003 provided that L. would attend a regular 1st grade class with paraprofessional support. Id. L. was provided 25.5 hours of special education academic support as well as 2.5 hours per week in the special needs kindergarten to address social skills and sensory issues. Twenty-two hours per week were spent with non-disabled children. Related services in speech, occupational therapy and physical therapy also were provided. Id. at 26. The team agreed to purchase the Clicker 4 software with staff training by ACES and to provide the support of an outside consultant to address inclusion and behavioral strategies. Id. at 1. The Parents were to meet monthly with the case manager and three times per year with the larger IEP team. Id. at 2. L.'s IEP contained 10 measureable goals with 20 pages of objectives. Id. at 6-25. The progress reporting completed in June 2003 showed mastery of many objectives as well as satisfactory progress on many others on the 2002-2003 IEP. Exhibit P-113.

18. A behavior observation report in June 2003 documented that L. had made significant progress in reducing the behaviors that were interfering with her classroom participation. Exhibit P-115. During a two hour time span on two separate days, L. used negative behaviors 25% of the time as opposed to 50% at the beginning of the year. Id. A behavioral assessment conducted between June 2003 and September 2003, also documented improvement and continuing areas of concern. Exhibit P-120.

19. The Parents were very pleased with L.'s 1st grade year and thought the classroom teacher was "phenomenal." Testimony of Mother.

20. L.'s annual review was conducted on May 25, 2004. The team planned a program for L. to attend a regular 2nd grade classroom with supports. Exhibit P-125. A review of L.'s IEP goals and objectives for 2003-2004 showed that she had attained mastery of many goals and made satisfactory progress on other goals. Exhibit P-122. The 2004-2005 IEP provided 20 hours with non-disabled peers, 28 hours of special education instruction and continued related services of 1.5 hours of speech, 1.0 hours of OT and .75 hours of PT per week. Exhibit P-125 at 23. The Parents signed a consent for a comprehensive triennial evaluation by the school psychologist, physical therapist, occupational therapist, speech/language pathologist and special education teacher. Exhibit P-127.

21. L.'s triennial evaluation was conducted during the summer and fall of 2004. Exhibits P-128 to P-130 and P-132. "L.'s behavioral concerns and the development of effective interventions to address them have been a priority of the team that works with L. since her enrollment in the pre-school program (see reports)." Exhibit P-132 at 3. In the area of speech and language, Ms. Hoskins reported that: "L. has demonstrated slow, steady progress over the past three years, and more significantly during the past year. Her length of utterance ranges between two and six word phrases and she responds well to cues and prompts such as manual signs to include articles and prepositions." Id. at 5-6. "L. makes appropriate eye contact, comments and initiates conversation and participates in two to four verbal exchanges. She is very polite and responds consistently with 'please' and 'thank you.' The staff continues to encourage L. to 'use her words' rather than impulsively acting out, and L. has notably improved in this area." Id. at 6. The reports were discussed at a PPT meeting on January 31, 2005. Exhibit P-134. The previous goals and objectives were continued, except one physical therapy goal was changed. Id.

22. The Parents thought that L. did very well in 2nd grade. Testimony of Mother. L.'s annual review was conducted in May 23, 2005. Exhibit P-135. The team developed an IEP for the ESY 2005 and the 2005-2006 school year. Id. at 1 and 28. L. was placed in a regular 3rd grade classroom with a modified curriculum and one-to-one support from the special education staff. L.'s program included 26.5 hours per week of special education, related services in speech, physical therapy and occupational therapy, and a one-to-one tutor. The related service providers also provided indirect services to the team. L. would spend 19 hours per week with non-disabled peers. Id. at 28. L.'s time in a resource room provided for one-to-one or small group instruction away from the distraction of the general classroom, privacy for toileting and to provide needed sensory breaks throughout the day. Id. The team also recommended an FBA in the fall 2005. Id. at 1.

23. In November 2005, the Parents requested an AT evaluation. Exhibit P-138. The school agreed to the request and retained ACES to perform an assessment in December 2005. Exhibits P-141 and P-148. The Parents signed a consent to transfer information to ACES on December 5, 2005. Exhibit P-140. A PPT meeting was held on December 22, 2005 to discuss the AT referral and to discuss L.'s progress on the current IEP. One goal was modified and accepted. Exhibit P-147.

24. Bonnie Muller conducted an FBA on November 17 and 21, 2005. Exhibit P-144 at 2-4. She drafted a Behavior Intervention Plan ("BIP") on November 21, 2005. Id. at 5. Ms. Muller provided both to L.'s team. Id. at 1. This BIP provided, among other things, consequences for inappropriate behaviors, specifically "name-calling or physical aggression, disruptive or unsafe = removal, count to 50 (Time-out)." Id. at 5. It also provided a crisis management plan that involved calling the Parent to send L. home once to see if it affected her self-regulation. "If not, then send-home is not a good alternative. If it is used, time at home should be as bland as possible." Id. The Mother was critical of this plan. Testimony of Mother A BIP was developed by the team and Ms. Muller on December 15, 2005, which did not have the crisis management plan. Exhibit P-143.

25. The Mother claims that she was unhappy because the BIP wasn't working and she contacted the SDE who referred her to The Student Technical Response Team ("STAR") from the University of Connecticut A.J. Pappanikou Center for Developmental Disabilities.

Testimony of Mother. Ms. Van Deun contacted the Center and was provided with information on March 22, 2006. Exhibit P-149. The Mother signed a consent on March 24, 2006 for the exchange of information between the Board and the STAR team. Exhibit P-150.

26. Nancy Shuster completed a follow-up report of the previous AT assessment on April 3, 2006. Exhibit P-151. The school team reported that there had been an overall decrease in the use of AT since 2003 because it had become a distraction to L. Id. For example, L. would throw her non-slip clipboard at the staff or push it away. Id. L. had only a five to eight minute attention span at the computer. Id. at 1-2. In addition, L.'s reading skills had increased to the point that the need for pictures to be paired with the words had diminished. Id. Ms. Shuster concluded that: "Based on the above history and observation, L[.] requires a guided and structured setup for any educational task. It is important to consider that assistive technology should be used when other strategies are ineffective and should not replace successful no-technology methods." Id. at 3. She worked with L. on the Clicker Writer, the talking processing component of the Clicker 4 software. This is helpful to L. because her fine motor skills are delayed and alternative methods are needed for her to practice reading and writing skills. L. successfully used the program and effectively used the mouse. Since the program is self-directed, it reduces off-task behaviors and promotes her attention to the educational tasks. Id. at 3-4 and 7. Ms. Shuster also recommended a one month trial of Cloze Pro for closed-end writing tasks, e.g., worksheets, reading skill building, spelling and ordering text to create a sentence. Id. at 4. At the Parents' request, the evaluator specifically considered the appropriateness of a voice-activated computer system. Id. at 8-9. She concluded that it was not appropriate for L. at that time because it required a reading and spelling level of 4th to 5th grade, while L.'s level was 1st grade, and for several other reasons. Id. The evaluator provided additional training to staff as part of her services. Exhibit P-154.

27. On May 11, 2006, L. threw a chair at a staff member. An hour later, she bolted from the classroom toward an outer door. She also made verbal threats to staff that day. Exhibit P-156. A review of her daily behavior sheets showed a pattern of hitting, spitting and name calling during that week. L.'s Parents were advised that she was excluded from school for the following day for health and safety reasons so that the school could meet with the Parents to discuss how to address dangerous behaviors. Exhibit P-156.

28. A PPT meeting was scheduled on May 23, 2006 to conduct an annual review of L.'s IEP, but the team decided to keep the December 2005 IEP in place until they had the opportunity to review the STAR team report. Exhibit P-159.

29. The STAR team made a report on May 24, 2006, following a collaborative meeting on May 23. Exhibit P-160. The reason given for the referral to the STAR team was the Parents' concerns over the school wanting a psychiatric evaluation of L. and increased concerns about the implementation and monitoring of behavior management strategies. Id. at 2. The STAR team framed the focus question as: "Has the school district implemented and monitored a system of behavior management that provides L[.] with the opportunity to be successful in the general education setting?" Id. The consultant, Ronald Tamura, Ph.D., reviewed L.'s records, met with the Mother, Mr. Handi, the school principal, and Mrs. Stratton, L.'s special education teacher, and observed that L. on two occasions within a general education classroom, during transitions to other classrooms, on the playground and in a resource setting. Id. Dr. Tamura noted that L.'s December 15, 2005 BIP was revised on March 10, 2006 and initiated on March

14, 2006. The revised plan provides a set of contingencies that increase in nature when she does not respond appropriately. “(1) L[.] is offered choices, (2) she is taught skills to replace the target behavior, (3) aggressive behavior (hitting, kicking, biting, throwing) is noted daily, (4) a token system consisting of five green smiley tokens which are earned at a rate of one every 10 minutes with verbal reinforcement for successful work, (5) if the behavior occurs, redirection/verbal warning/time-out, (6) if the behavior occurs again, principal to speak with her, (7) if the behavior occurs again, L[.]’s parents are called, and (8) if the behavior occurs again, then L[.] is sent home and the team meets to make changes to the plan.” Id. at 2-3. For curricular activities, he stated that: “L[.] was observed engaging in the general education curriculum with the supports necessary to be an active participant in the class.” Id. at 4. He also concluded that L.’s program was being administered in a way that was teaching her to become “prompt dependent” and that consistent implementation of the behavior system was needed between service providers. Id. A five-step action plan was recommended, which included who was responsible for each action step, when it was to be done and how success would be measured. Id. at 5-6. Two of the steps were to develop an effective behavior management system that includes data collection and consistent implementation and to provide a behavior consultant to assess and provide support in developing that system. Id.

30. The Mother complained that she had to pick up L. from school so many times that she had to quit her job. Testimony of Mother.

31. At the PPT conducted on June 16, 2006, the Parents again refused the school’s request for a psychiatric evaluation as well as placement in a specialized program in the ALFA program at Clintonville School. Exhibit P-161 at 3. The Parents indicated that they would pursue a psychiatric evaluation at their own expense. Id. at 4. The STAR team report and the AT evaluation were reviewed. The proposed IEP goals and objectives for 2006-2007 were reviewed and accepted, but the Mother wanted to review the behavior goal again in the fall. Id. The Parents agreed to consider completing behavior rating scales. The District agreed to hire a behavioral consultant to assist the staff in planning and training. In addition, the school agreed to purchase Cloze-Pro as recommended for a trial by the AT evaluator. Id. The IEP provided for 27.25 hours of special education and 4 hours of related services. L. would spend 19.25 hours per week with non-disabled peers. Id. at 25.

32. The Parents consulted Dr. James Black in July 2006 for a psychiatric evaluation of L. Exhibit P-162. He issued his report on August 23, 2006. Id. at 1. The Parents did not provide this report to the District until November 16, 2006. Id. at 7. They signed a consent on that date for the District to obtain information from and release information to Dr. Black. Id. at 8. Dr. Black obtained his information about L. from interviewing the Parents, reviewing some school records, Dr. Cardona’s report and records from the Department of Communication Disorders at Southern Connecticut State University provided by the Parents, and meeting with L. Id. at 1-5. He did not speak to anyone on the school staff. Dr. Black reported that although L. has a nice relationship with the other students and they support her with teacher encouragement, at the time of the report L. did not have a best friend and students did not socialize with her outside of school hours. Id. at 2. The Parents reported the following:

During her 2nd grade school year, L[.] had one incident wherein she acted aggressively in February 2005. This past school year, her 3rd grade year, [L.] did well initially, but as time went on, there

have been more aggressive incidents. She will become noncompliant, talk back and become rude and disrespectful, but except for her hitting, kicking and pushing, the aggressive occurrences are more recent. Desirous of being independent, if L[.] goes to the movies, she wants to go the bathroom by herself, and when she arrives at school in the company of her mother, she wants to go in alone. L[.] has been known to go into the lavatory and lock herself in. Sometimes, L[.] has had meltdowns at grocery stores and at doctors' offices, and apparently, you, [Mother], have trouble controlling her during her meltdowns. As I understand it, it is your wish that L[.] remain at [current school] since you, [Mother], have observed the special needs class. It is your opinion that the special education approach at [current school] is a better approach that L[.] would experience elsewhere.

Id. at 3. After reviewing the records provided to him and meeting with L., Dr. Black gave this summary:

[T]his 10.7 year old girl suffering from Down syndrome has intellectual impairment, serious articulation difficulties, and concrete thinking that is characteristic of children who are mentally handicapped. Clearly, since L[.] is developing secondary sexual characteristics, and therefore, experiencing hormonal changes, it is understandable that she would be reentering the oedipal phase of development wherein she is very connected to her father, and not so responsive to her mother; in part, explaining your, [Mother's], greater difficulty in containing L[.] Further, because, of her intellectual difficulties, she is decidedly, dependent upon both of you, and as she enters preadolescence, she is submerging that dependence and becoming more rebellious. Also, because of her intellectual difficulties, L[.] sinks in her maturational level to the preoperational phase of cognitive performance and engages in both wish fulfillment and fear fulfillment fantasies, and the use of imaginary friends. Such behavior emanates from a regression in L[.]'s maturational level and does not represent a psychotic disorder inasmuch as L[.] does not have a thought disorder. Such regression is not uncommon in mentally handicapped children.

Id. at 5-6. He also concluded that the increase in L.'s aggressive behavior over that past year was attributable in part to vulnerability associated with her intellectual impairment. Id. at 6.

As a result, she projects her negative self-perceptions into her environment, and as she becomes more aware of the disparity between herself and her peers in terms of coping skills, she is increasingly sensitive to adult criticism and disapproval. Therefore, with transitions, teacher direction, the slightest perception of criticism, and the imposition of even reasonable adult

control, L[.] may distort reality, view what is taking place as a threat and respond with dramatic overreaction, out of control behavior, and aggression.

Id. Dr. Black did not offer any recommendations. Id.

33. The Mother's testimony have a very different picture of L. at home than the one she described to Dr. Black. She testified that L. is a "bright, enchanting, social, beautiful young lady." In her home, "she's quite independent." She described L. as being able to "cook her own breakfast, clean the house, do a shopping list, put groceries away." She stated that L. "does all her self-help skills by herself, takes her own bath or shower every day, bakes cookies and cup cakes, and reads recipes." She also said that L. behaved appropriately with relatives and will set and clean the table when visiting. Testimony of Mother. To the extent that this testimony differs from statements attributed to her in Dr. Black's report, I do not find her testimony credible.

34. In September 2006, ACES was hired to provide behavioral support to L.'s team as a result of the increase in her aggressive and non-compliant behaviors since spring 2006. Exhibits P-163 and P-165. The Mother also signed a consent to release information to Dr. Tamura of the STAR team on September 26, 2006. Exhibit P-164. On October 16, 2006, the Mother signed a consent for the school psychologist to conduct a behavior assessment using the behavior rating scales. Exhibit P-166.

35. Ellen Baecker, M.A., ACES Behavior Analyst, began meeting with staff, observing L. and meeting with her Parents from October 3 through October 31. Exhibit P-169. Ms. Baecker, working under the supervision of Dr. Donn Sottolano, prepared a crisis management plan on November 1 to formalize the procedures that the school would use if L. was unsafe. Exhibit P-167. This was requested by the school team due to an increase in L.'s eloping from the classroom and aggressive behaviors. Currently, there was no procedure in place for dealing with L.'s unsafe behavior. Id.; and Testimony of Dr. Sottolano. The crisis intervention plan was intended to be used until the FBA and behavior support plan were completed. Id. The Parents objected to this plan even as an interim measure. They objected to the procedure which required them to pick up L. at school at any given time during the day. On November 7, they sent an e-mail to Estrellita Thorpe, with copies to Ms. Baecker, Ms. Van Deun, Mr. Handi and Dr. Sherman at Southern Connecticut State University. Exhibit P-170. They attached a letter from Dr. Sherman, which they said fully explained their reasons. Exhibit P-168. The Parents hired William Sherman, Ph.D., Licensed Psychologist, to review and critique L.'s behavior plans and to give them an opinion on which school L. should attend. Id. On November 8, 2006, the Parents signed consents for the school to release information to Judith Itzkowitz, Ph.D. and Dr. Sherman. Exhibits P-171 and P-172.

36. Ms. Baecker completed the FBA and used the data she had collected to draft a proposed behavior management plan in mid-November. Exhibit P-173. Ms. Baecker summarized the FBA. She noted that the function of L.'s behaviors appears to be to escape an environment she may find punishing. These behaviors may relate to her frustration when she is not successful in completing tasks of front of peers. Antecedents to the problem behaviors include transitions, requests to do non-preferred activities or a request to complete work that is different from her peers. The problem behaviors are likely being maintained and strengthened by an inconsistent response from staff. "In an effort to prevent L[.] from being in an unsafe

situation, staff have allowed L[.] access to reinforcers after she has engaged in one of the identified target behaviors. Therefore, L[.] may have learned to engage in the problem behaviors in order to terminate a potentially punishing situation.” Id. at 1. The plan provided many environmental, instructional and reinforcement strategies and a safety management plan. Id. at 2-5. The safety plan proposed that when L. presented a danger to herself or others by certain acts of aggression or elopement, L. would be escorted to a place in the school that did not have stimulating materials and would remain there with staff for five minutes. It provided that she would not be given any attention during the five-minute period and that after completing the time, staff would address the behavior via use of a social story. Id.; and Testimony of Dr. Sottolano. The Behavior Support Plan provided for review with staff and L. prior to implementation and data collection on incidents of aggression, eloping and defiance would continue. The Plan would be reviewed within four weeks to assess its effectiveness and determine whether changes were needed. Id. at 5. Ms. Baecker included a data collection form created by Dr. Sherman, which he requested be used. Id. at 11. Notably, this plan did not provide that Parents would be called to pick up L. at school.

37. The Parents disagreed with this plan. They objected to the time-out area. Testimony of Mother. “L. needed a program which had a lot of positive reinforcement built into it for target behaviors that we identified as appropriate target behaviors.” Testimony of Dr. Sottolano at 61. “The inappropriate target behaviors . . . that had to be more effortful for her, so that there was a contrast between that and appropriate targets. And we had to eliminate the access to reinforcement that was currently in place for those target behaviors.” Id. “A common procedure for removal of reinforcement is one of two things. Extinction, which basically means ignore the behavior so that the person doesn’t encounter the reinforcement. In L[.]’s case that’s not possible and often, quite frankly, in school settings where you have large populations, extinction typically is not an effective behavior procedure. There also is time-out, which is a well documented intervention which has been used. You can find it in hundreds of scientifically based articles.” Id. at 61-62. Dr. Sottolano has a Ph.D. in school psychology, with a focus on behavior analysis, and he has 20 years experience with ACES in this field. Exhibit B-5. A room was identified by the team, and the District agreed to make some modifications to the room to make it safe, appropriate, well lit, and ventilated. Testimony of Dr. Sottolano at 69. When the Parents raised objections to that room, the team talked about using a conference room. The Parents were okay with that room. Id. at 70. “Time-out means time away from reinforcement. So, the room in and of itself, the physical room, unless you have a kid who’s so out of control you need a room to keep them safe, the room itself was less relevant to me than the function of no reinforcement because that is the actual procedure.” Id. at 70-71. “[T]he Parents wanted the person monitoring her in the room to be able to engage her in activities so that she would feel better. And I disagreed on the basis that it was no longer timeout and actually could function as a reinforcing activity.” Id. at 71. “[Y]ou can call it whatever you want, chill-out, relax room, because it’s not the name, it’s not the design, it’s what functionally happens. So, we had an impasse on that, and it was -- Parents refused to agree with us on the change of planning timeout for that area.” Id. After several months of trying to work with the Parents, Dr. Sottolano called Ms. Van Deun to say “[t]hat I could no longer participate in the planning because I was starting to have concerns over the -- my ethical positions with providing plans that I thought were inadequate to help L[.]” Id. at 86. If reinforcement could not be removed for inappropriate behavior, I just didn’t see any reason why she should stop being inappropriate. Id.

38. Joan Falcigno, school psychologist, completed an updated behavior assessment of L. in December 2006 using the Behavior Assessment System for Children-2 (BASC-2), Teacher Rating Scale (TRC) and Parent Rating Scale (PRC). L.'s special education teacher and tutor completed the TRC and the Parents each completed a PRC. Exhibit P-174. Ms. Falcigno concluded that L. exhibits behaviors at school in the clinically significant range. The most significant behaviors were in the Externalizing Problems area, which includes her hyperactivity, aggression and conduct problems. Id. at 3. "The increases in L.'s externalizing behaviors in school are a safety concern because of the risk of possible injury to herself and to others." Id. at 4.

39. In November 2006, the Board retained Judy Itzkowitz, Ph.D., Special Education, as an education consultant to work with L.'s team, to develop her program and to coordinate between home and school. Testimony of Dr. Itzkowitz. Dr. Itzkowitz has extensive experience working with and consulting about children with intellectual disabilities with challenging and developing inclusion programs for them. Id. and Exhibit P-238. She has been a consultant to many school districts in Connecticut and has developed protocols and programs for the SDE. Exhibit P-238 at 1-14. In November, she began by meetings with the Parents and staff, reviewing L.'s records and observing L. Exhibit P-175. She attended PPT meetings from November 2006 through November 2007. Testimony of Dr. Itzkowitz.

40. A PPT was held on December 20, 2006 to discuss several items, including a review of the current program, review Dr. Black's psychiatric evaluation, review the behavior goals and objectives, review Ms. Falcigno's Behavior Assessment, update the behavior plan and the STAR team follow-up. Exhibit P-177. In addition to school staff and the Parents, Ms. Baecker, Dr. Itzkowitz and Dr. Sherman attended the PPT meeting. Exhibit P-180. Per Parents' request, the Behavior Assessment was deferred to another PPT meeting. Ms. Baecker's Behavior Support Plan was discussed. A time-out room was proposed, but the Parents rejected the use of time out as described in the behavior plan. The team discussed the need for reactive strategies for inappropriate and/or aggressive behaviors and the behavior goal. The team will reconvene to address this. The revision of the IEP behavior goal, objective 3 was accepted. The remainder of the IEP would continue. The STAR team follow-up survey was reviewed. Id. at 2. The team also discussed the possible benefits of introducing another staff member to work with L. Disciplinary actions that have been implemented and/or may be required were discussed. Id. at 3.

41. Dr. Itzkowitz supported the option of sending L. home for aggressive behavior. Testimony of Dr. Itzkowitz. It was the best option at that time. Id. She tried to help the team with early strategies to avoid getting to that point. L. was tired a lot. She also needed to work on using words to communicate her needs. A behavior plan is a work in progress. Id. Dr. Itzkowitz and Ms. Thorpe looked around the school building for a time-out space. Id. Dr. Itzkowitz usually works with behavior and learning, but in this case she was asked to work collaboratively with ACES on positive behavior supports. Reactive strategies were a problem area. She recommended a "chill out" space, but that was not accepted. Id. The team agreed that having the Parents pick up the Student was the best option in December. She did not know if that was equivalent to a suspension from school. Id.

42. On January 4, 2007, the Parents sent a certified letter to Ms. Van Deun requesting all of L.'s educational records since November 14, 1998 pursuant to FERPA. Exhibit P-185. The Mother signed a receipt for the records on January 7, 2007. Exhibit P-187.

43. On January 12, 2007, Ms. Baecker updated and provided a detailed outline of the Behavior Support Plan. Exhibit P-188. She provided an Activity Schedule Procedure describing first that the trainer would model all skill sets, then staff would practice skill sets with trainer feedback, then staff would be trained to 90% criteria in demonstrating skills and finally, periodic observation and feedback would be provided. Id. at 2. The plan also outlines the Token Program. Id. at 3. It also provides for a Communication Notebook, Transitions Procedure, Break Card Procedure, Use of Social Stories/Cognitive Picture Rehearsal and finally, the Safety Management Plan. Id. at 4-5. The safety plan initially recommended in November 2006 a time-out intervention to help decrease L.'s aggressive behavior, which the Parents rejected. They also had first rejected the crisis intervention procedure of picking L. up from school when her behaviors were aggressive and she had not responded to positive strategies in the plan. The only course available to the school was to call the Parents and suspend L. for the remainder of the day. Id. at 5. Suspension was the decision of the school principal. Testimony of Ms. Van Deun. Ms. Baecker recommended numerous antecedent strategies to prevent aggressive behaviors from occurring, including using the sticker chart, planned ignoring, and limit use of verbal cues and increase use of visual cues. Exhibit P-188 at 5.

44. At a PPT on January 17, 2007, the team conducted a Manifestation Determination and concluded that L.'s behaviors were a manifestation of her disability. Exhibit P-190. The manifestation form explained that L. could not be disciplined for conduct that was a manifestation of her disability. Id. at 6-7. The misconduct by the Student was described as:

1/5/07: spitting at staff, kicking, throwing items at staff and another student, hitting staff, eloping, slamming classroom door that hit another student

12/22/06: spit at and hit her tutor, pushed tutor against the wall

11/16/06: twisting teacher's arm, spitting at teacher, throwing shoes at teacher, eloping

11/15/06: hitting/pushing staff member, locking self in bathroom stall, refusing to come out

Id. at 6. The team's response to the question: "Was the misconduct in question a direct result of the district's failure to implement the IEP (in relationship to the misconduct in question)?" was "no." Id. The comment was added:

The planning and placement team have frequently revised L[.]'s behavior Plan and have contracted with ACES Behavior Services for consultation. The team agrees that the behavior plans to date have not been successful in reducing the behaviors in question.

Id. The Parents were given Procedural Safeguards on December 15, 2006 and again on January 17, 2007. Id. The PPT reviewed Ms. Baecker's January 12 proposed Behavior Plan. Id. at 5.

The Parents came to the PPT meeting with a letter, which they asked to be attached to and made part of the minutes. Id. at 4. The letter stated that L.'s IEP and Behavior Plan were not appropriate and that the Board has failed to place her in regular classes "without adequate support services." They asked the Board to retain a mutually acceptable independent consultant to assist the team in the development of an appropriate IEP and placement in regular classes and to retain a mutually acceptable behavior management consultant to help develop and implement an FBA and Behavior Support Plan. They also requested an independent education evaluation of L.'s special education program and behavior plan at Board expense. Id. The Parents' request for an independent educational evaluation was refused. Their requests for an independent evaluation and Behavior Plan were tabled to the next PPT meeting. Id. at 5.

45. The PPT reconvened on January 24, 2007. Exhibit P-191. The team recommended that the STAR team return for a follow-up to assist with programming. The team recommended training for staff and Parents on the implementation of the Behavior Plan. The team recommended the revised integrated behavior plan be implemented. The Parents still agreed only with the proactive components of the behavior plan until completion of the STAR follow-up and report. Id. at 3. The team upheld its refusal of an independent evaluation because consultants have been hired and are currently working. Id. at 4.

46. Ms. Baecker drafted a revised Behavior Support Plan on February 8, 2007. Exhibit P-191. This plan did not have a safety management plan.

47. On February 16, 2007, the Parents wrote a letter to Ms. Van Deun complaining that the February 8 Behavior Support Plan was not complete because it did not include strategies being used by the school staff, specifically calling the Parents to pick L. up at any given time, suspension and removal from her 4th grade classroom. Since Parents objected to all these strategies and since they were not in the plan, they argued that the plan was incomplete and they would not agree to its implementation. They also complained that their other daughter was taken from her classroom to assist the staff in managing L.'s behavior. Exhibit P-193.

48. A Core Team Meeting was held on March 5, 2007. Both Parents attended, as well as Ms. Baecker, Dr. Itzkowitz, Deb Patten (L.'s paraeducator), Mr. Handi, Ms. Thorpe, Ms. Hoskins, Mr. Falcigno, Nancy Skedgell (school social worker), Jen Arters (special education teacher) and Laura Donle (general education teacher). Exhibit P-194. Ms. Hoskins reported that she was supporting L. during recess on Thursdays. Id. at 2. The occupational therapist, Claire Heffron, supports L. in the regulation classroom to provide integrated related therapies on Thursdays. She also preteaches L. the material for the following day in a pull-out service. Id. Ms. Baecker discussed the Behavior Plan and the staff training that was done the previous week. Ms. Baecker wanted all school staff and Parents to sign the Plan. The Parents said they would not sign it. The team discussed the role of L.'s sister. Mr. Handi stated that he had called her in on one situation in the music room where L. was with a substitute paraeducator. This was not a strategy in the plan. All team members would reflect on this issue and discuss it at the next team meeting. Id. Behavior Incident and Debriefing Forms were distributed for review and discussion at the next meeting. Id. at 2-5.

49. A Connecticut Mastery Test ("CMT") Skills Checklist was administered to L. on March 5, 2007. Exhibit P-195. Scores were grouped into four areas: Reading, Communication, Mathematics and Access Skills. Id. at 3. L. scored at the Basic level in Reading, the Proficient

level in Mathematics and Communication and at the Application level in Access Skills. Id. In the Communications area, the two sub-tests are Communicating with Others and English Language Conventions/Writing. L. scored 18 (of a possible 36) and 14 (of a possible 24) respectively, for a total Communication score of 32 (of a possible 60), which gave her the Achievement Level of 2 (Proficiency). Id. at 7. On Access Skills, the five sub-tests are Receptive Communication, Expressive Communication, Social Interactive Communication, Basic Literacy and Basic Spatial Relationships. L. scored 24 (of a possible 28), 20 (of a possible 22), 16 (of a possible 22), 14 (of a possible 16) and 12 (of a possible 12) respectively, for a total Access Skills score of 86 (of a possible 100), which gave her the Achievement Level of 3 (Application Level). Id.

Application: Students who perform at this level **can generally complete** the communication and pre-academic skills that students without disabilities typically develop prior to school entry **consistently** and **independently** in different real life situations without support, i.e., cues, prompts, modeling, etc. They are generally able to communicate effectively with peers and adults in real life situations and they can participate in classroom routines and activities independently.

Id. at 6. (Emphasis in original).

50. These CMT results are consistent with Ms. Hoskins' opinion that L. did not require augmentative communication devices, which are generally used with non-verbal children or those with a physical problem such as cerebral palsy. Testimony of Ms. Hoskins. L. was able to verbally express her basic needs and wants. Id. She was understandable by those who knew her, including peers, teachers and staff. Id. During the 2006-2007 school year and the fall 2007, L. could formulate questions, initiate conversations (up to three exchanges), use three to four-word utterances more frequently, also use two-word and occasionally five to six-word utterances. Id. Since the 2005 Triennial evaluation, L. had more vocabulary, longer utterances and improved pragmatic skills. Id. It would be cumbersome for L. to use a communication device and it would slow down her communication. Id.

51. The second STAR Report, prepared by Kathleen Whitbread, Ph.D., was completed on April 21, 2007. Exhibit P-196. Dr. Whitbread interviewed Dr. Tamura, the Parents, Ms. Arters, Ms. Donle, Dr. Itzkowitz and Ms. Baecker. She also reviewed the Student's records and observed her on February 13 and April 2. Id. at 2. Dr. Whitbread noted that L. spent 61% of her time with non-disabled peers. L. was making satisfactory progress on all IEP goals and objectives, except the behavior goal and objectives, which were all rated as unsatisfactory. Id. at 2-3. She noted that L.'s behavior had been a problem since preschool and that in the past eight years there were 10 behavior assessments by a number of consultants and staff. Id. at 4. The types of problematic behavior have remained "largely consistent across the years." Id. Recommended strategies have also remained consistent "across the years and many have been recommended since kindergarten." Id. Dr. Whitbread prepared an appendix to the report summarizing each report by date, consultant, target behavior and recommended strategies. Id. at 11-14. Although Dr. Whitbread stated that she had taken the data collected by the District staff over the past year, coded and entered it into a database in order to report frequency of behavior, the table she reference as "below" is not in the report. Id. at 5. At the time of her report, L.'s

problematic and unsafe behavior was significantly interfering with learning and relationships. Id. at 8. A number of previous evaluators had noted that the various positive and preventative strategies were not consistently implemented, and the behavioral data had not been systematically analyzed to determine which strategies were working and which ones were not. Id. For these reasons and because she believes that seclusion time-out is a highly restrictive practice that research has not shown to be effective in changing behavior, she recommended that the “team systematically evaluate the effectiveness of less restrictive methods before considering seclusion time-out.” Id. She also added a Literature review on Seclusion Time Out in the appendix. Id. at 15-19. Dr. Whitbread recommended that the team employ a consultant on behavior management that was acceptable to the family and District who was skilled in using positive behavior supports. Id. at 8-9. She noted that L.’s Parents were strongly opposed to seclusion time-out. Id. at 9. She also recommended that the function of L.’s access to the general curriculum be defined, her time with non-disabled peers be increased and that a Multisensory Structured Language approach to literacy such as Wilson or Project Read reading program be instituted. Id. at 9-10. The report also recommended that the team retain a paraprofessional/tutor who has training in positive behavior supports and experience working with students with behaviors similar to those L. was exhibiting. Id. at 9.

52. A PPT meeting was held on May 21, 2007, to review the April 21 STAR team report. Exhibit P-200. The Parents came to the meeting with a letter, which they wanted attached to the minutes. Id. at 5. The letter made four demands: hire Ann Majure as the independent consultant on behavior management, continue Dr. Itzkowitz’ services as an independent consultant, reconvene a PPT meeting with the two consultants to develop a behavior management plan and IEP to include Dr. Whitbread’s recommendations and state in the PPT minutes that ACES would no longer be involved with L.’s program. Id. The PPT agreed to retain Ann Majure, Ph.D., as the behavior consultant. Id. at 3. The PPT agreed that the services of ACES staff would not be used to implement L.’s behavior plan. Id. The Parents cannot complain that L. did not make progress behaviorally in 2006-2007 when they rejected an appropriate behavior plan by two very well qualified behavior consultants. Testimony of Dr. Sottolano; and Exhibit B-5. The PPT also agreed that a draft IEP would be presented to the Parents and Dr. Itzkowitz before the next PPT meeting. Id. The District made known its decision to change the special education teacher and tutor assigned to L. case immediately. The Parents’ request to delay the staff changes until Dr. Majure became familiar with L.’s case was refused. Id.

53. Dr. Majure received a doctorate in 1994 from the University of Wisconsin in special education with a specialization in severe communication and behavior disorders. Exhibit P-237 at 10. She received a Masters in Social Work from the University of Arkansas in 1975 with a specialization in clinical social work. Id. at 11. She received a Bachelor of Science in 1971 from Millsaps College, Jackson, Mississippi where she majored in mathematics. Id. Dr. Majure is a licensed Clinical Social Worker in Connecticut and is certified as a School Social Worker in Connecticut. Id. Since January 1998, she has been in private practice as a Behavioral and Educational Consultant. Id. at 1. In that capacity, she provides consultation, training and technical assistance to students, schools, parents and service providers. Id. She also provides workshops/training sessions on a range of topics, including behavioral assessment and non-aversive behavioral interventions. Id.

54. Dr. Majure has worked with many school districts in Connecticut to develop and implement appropriate programs for children with intellectual disabilities. Testimony of Dr. Majure. She creates an FBA and BIP, which should be integrated with the IEP goals and objectives not separated. Id.

55. She first worked with L. when she was in kindergarten. Id. This was done privately with the family, not with the school system. Id. In the spring of 2007, the Mother contacted her. Then the District called her about L.'s problem behaviors. Id.

56. Dr. Majure is familiar with Dr. Itzkowitz. They have similar practices. She had never worked with Dr. Itzkowitz regarding a specific student until May 2007. Id. They had frequent discussions about their roles with L. Dr. Itzkowitz worked with the PPT on goals and objectives and on curriculum modifications. Dr. Majure worked on behavior issues. They had a positive and collaborative relationship. Id.

57. Dr. Majure conducted several observations at L.'s school, reviewed her records, met with her teachers, both the current and anticipated ones for the 2007-2008 school year. Id. When she observed L. she was in regular classes most of the time. Id.

58. The PPT met on June 11, 2007. Exhibit P-203. Drs. Majure, Itzkowitz and Whitbread attended. Id. Dr. Whitbread presented the STAR team report. Id. There was an extensive discussion about L.'s reading program. The PPT recommended that Jean Parkin, special education teacher, administer the WADE to determine L.'s reading level for the Wilson Reading Program. Id. at 2. There was also a discussion of shared goals and objectives. Id. Dr. Majure has worked with Dr. Whitbread as co-consultants with a student with intellectual disability. Dr. Whitbread's area is inclusion, not behavior. Testimony of Dr. Majure.

59. The PPT met on June 21, 2007. Exhibit P-205. Drs. Itzkowitz and Majure attended. Id. at 1. ESY goals and objectives in language arts and math were continued from the current 2006-2007 IEP. Ms. Parkin was not able to complete the WADE with L. Another assessment was scheduled for June 22 and 25 with the Parents present. Dr. Majure would observe L. in her ESY program and meet with Ms. Parkin during the summer. The team agreed to convene during the first week of school, review the FBA and proposed BIP to be completed by Dr. Majure and complete goals and objectives for 2007-2008. Id. A new reading goal was agreed on. Id. at 2 and 7.

60. Dr. Majure completed an FBA of L.'s behaviors and prepared a BIP dated August 31, 2007. Exhibit P-208. The purpose of the plan was to prevent behaviors from occurring by helping L. to develop greater coping strategies and other more acceptable strategies for expression. Id. at 1. The secondary purpose was to provide staff with safe, effective and consistent reactive strategies to use when the behaviors occur. Id. Dr. Majure concluded that previous behavior plans that used "tangible reward/consequence for her behaviors" were not effective in changing her behavior. Id. at 6. "The most powerful type of behavioral reinforcement is intermittent reinforcement delivered in such a way that the student never knows exactly when it will occur." Id. Dr. Majure supposed that being fully included with her peer group, doing what the other students her age were doing and being able to do so as independently as possible were most motivating for L. Id. She later realized that these assumptions were faulty and, as a result, her plan needed to be redone. Testimony of Dr. Majure. The proposed reactive

strategies to address the serious behaviors were similar to previous behavior plans, such as ignoring the behavior whenever possible and avoiding confrontation. Id. at 10. If behaviors presented an immediate danger, L. was to be physically escorted to another area where she could calm down. Id. at 10. She emphasized this was not a “time-out room,” but an area that is “private and quiet.” Id. She recommended that the team look for appropriate spaces in the school. Id. The escort was to be done by two staff members trained in safe physical management. Id. at 11-12.

61. A PPT meeting was held on September 6, 2007. Exhibit P-209. It was agreed that the Wilson Reading Program would be instituted and that physical therapy would be provided in physical education class, occupational therapy in art class and an additional 15 minutes of each to be provided in a resource room. Id. at 2. One hour of direct and one hour of indirect speech and language therapy would be provided. Id. Dr. Majure’s report was reviewed. The Parents had some concerns with the plan. The team recommended (as suggested by Dr. Majure) that Physical Management Training (PMT) be provided to L.’s team. Id. The PPT agreed to reconvene to finalize the behavior plan and IEP. Id.

62. The Parents brought a letter to the September 6 PPT outlining their concerns. Exhibit P-211 at 3. Ms. Van Deun responded on September 18 outlining the ongoing consultation by both Drs. Majure and Itzkowitz, the fact that the proposed IEP provided for at least 80% of L.’s time to be spent with non-disabled peers and the District’s efforts to schedule PMT as soon as possible with Physical Management Associates since Dr. Majure does not do this training. Id. at 1-2. The PMT was done in early October. Testimony of Dr. Majure.

63. A PPT meeting was held on September 21, 2007. Exhibit P-212. At that meeting the PPT adopted an IEP for the 2007-2008 school year including the Behavior Plan proposed by Dr. Majure. Id. at 2-3. The IEP provided that L. would spend 26.25 out of a possible 31.25 hours or 84% of the school week with non-disabled children. The other 5 hours would be reading instruction in a resource room. Id. at 22.

64. L. did not respond to her 5th grade teacher as well as she did with her 4th grade teacher who could get L. to comply and participate. Testimony of Drs. Majure and Itzkowitz. L. did not want to be in the 5th grade classroom. She generally stayed for the start of day and specials, then left the classroom. She would often go to the special education teacher’s classroom (Ms. Parkin). Sometimes she went to the gym or into other classrooms or offices. She also used the telephone in the regular education classroom. Many of these behaviors were disruptive to other students and teachers. L. also isolated in the bathroom, sometimes for extended periods of time, sometimes lying on the floor. Testimony of Dr. Majure. Dr. Majure told Dr. Itzkowitz that L. needed to spend more time out of the regular education classroom, especially in the afternoons. Id. The team had identified three safe areas for L.—the special education classroom, the occupational therapy/social worker’s area and a room opposite the cafeteria, which was used as storage currently. Previously it had been used for testing and small group instruction. Each one was in a different area of the school. Id.

65. L.’s behavior did not improve, but rather worsened. There were numerous behavioral incidents that occurred between September 20 and November 2, 2007. Some of these are described by Angela Price, L.’s tutor. Exhibit P-216. Ms. Price had experience working with children with behavior challenges, but not as much direct experience as Dr. Majure would

have preferred. Testimony of Dr. Majure. The team planned to meet weekly on Mondays with Drs. Itzkowitz and Majure, but this didn't work out in September and October. They met together four times, not including PPT meetings. There was probably one weekly team meeting that Dr. Itzkowitz attended but Dr. Majure did not. Id. The team agreed they needed to change strategies in the classroom, but never reached a consensus on new strategies to use. Id.

66. The PPT had agreed in September to have an AT consultation done by ACES. Exhibit P-213. The Parents signed the consent on October 15, 2007. Exhibit P-214. It wasn't done because L. was suspended from school on November 2 and did not return.

67. The difficulties with L.'s behavior and in implementing the IEP at L.'s school led Ms. Van Deun to strongly suggest an early transition to the middle school. Id. The exploration of it began in October 2007. Id.

68. The PPT met on October 29, 2007 to discuss, among other things, L.'s behavior. The Parents contended that the increase in behavioral incidents was the result of sleep apnea, which affected her sleep. Exhibit P-217. Ms. Van Deun followed this up with a letter to Parents requesting information from L.'s doctor. Exhibit P-215. The Parents provided the school with a letter from L.'s doctor dated November 9. He could not answer the questions regarding the effect of L.'s sleep apnea on her alertness and academic readiness or her level of impulse control and compliance when she is overtired or its effect on her physical stamina. Exhibit P-218c.

69. On November 2, L. left the classroom and went to the bathroom. Ms. Price followed her (as provided in the behavior plan) and noticed L. waiting by the door. L. then began to shove and punch Ms. Price and bit her on the upper right arm. Exhibit P-218a. The local police were called to report the assault. Id. Ms. Price and the Superintendent of Schools, Jane Querfeld, did not want L. arrested or prosecuted. Id. at 2. On November 5, 2007, the school principal, Linda Cahill, wrote a letter to the Parents to inform them that L. was suspended from school for ten days—November 2 through November 19, 2007. Exhibit 233 at 6. On November 5, 2007, Ms. Cahill, recommended to the Superintendent, Ms. Querfeld, that L. be expelled from the school for physically assaulting a staff member. Exhibit P-234. An expulsion never occurred. Testimony of Ms. Van Deun.

70. On November 14, 2007 a PPT meeting was convened. Exhibit P-218d. The Parents and the Board were represented by counsel at the meeting. Id. at 2. The purpose of the meeting was to review or revise the IEP, for a manifestation determination and to review L.'s placement. Id. Because the team could not reach consensus on the manifestation determination, they agreed to treat L.'s behavior as if it were a manifestation of her disability. Id. at 3-4 and 6-9. The team recommended that homebound instruction be arranged as an interim placement beginning with five hours per week, which could be increased if L.'s stamina was good. The instruction would include L.'s reading program and one hour each of physical therapy and occupational therapy per week at a location to be determined. Id. at 3. The Student's IEP was revised to reflect these changes. Id. at 5. The reason given by the team for L.'s removal from regular education was: "The team has determined that a sufficiently intensive, structured and safe program can not be offered in the public school environment at this time. Alternate options are being explored." Id. The behavior plan was not revised because the FBA had recently been done and Dr. Majure did not have any suggestions regarding further modifications. Id. at 8-9. The team recommended that more behavior supports are needed and suggested exploring

therapeutic placements with a smaller child-centered program with consistently applied therapeutic interventions. Id. at 9. The Parents agreed that they did not want L. to return to her current placement at the elementary school and they agreed to the interim placement of homebound tutoring while other placement options were explored. Id. at 3-4 and 9. The Parents were asked to sign releases so that information could be sent to potential out-of-district placements. Id. at 3; Exhibits P-219 and P-221; and Testimony of Ms. Van Deun. The Parents' attorney informed the PPT that the Parents would file for due process. Exhibit P-218d at 3. They filed the following day. Exhibits P-220 and HO-1.

71. The District asked Dr. Majure to assist them in looking for other placements and to develop a program for L. in one of them. Testimony of Dr. Majure. She accompanied the Parents to visit High Roads Learning Center, Elizabeth Ives School and Foundation School. Id.; and Testimony of Mother. Dr. Majure found "pluses and minuses" with each school. The Parents rejected all of them. Id. The Parents did not bring L. to any of the schools for the intake process. Testimony of Ms. Van Deun. The District could not proceed further in recommending a specific school. Id.

72. They also visited the Learning House in Guilford, which specializes in reading issues, including testing and consultations on site for reading problems. Testimony of Dr. Majure. The Parents wanted L.'s tutoring to be done there. Id.; and Testimony of Mother. On November 29, 2007, Ms. Van Deun sent a letter to Susan Santora at the Learning House confirming the District's authorization to provide five hours per week of tutoring at the fee of \$100 per hour. Exhibit P-222. This agreement was extended beyond December 31, 2007 because of the length of this hearing. Testimony of Ms. Van Deun. Additional hours were authorized for 10 hours per week in March, 2008. Id.; and Exhibit P-253.

73. In February 2008, the Learning House reported that 32 sessions of individualized instruction have worked to reverse L.'s "strenuously resistant behavior to academic work." Exhibit P-236 at 3. Her behavior has interfered with her progress there. "Resistant behaviors included failing to stay in or leaving her seat or the room, failing to do assigned tasks or failing to do them as instructed, inappropriately touching the room's objects or the teacher." Id. L.'s Mother sits in the waiting room during the sessions. On two occasions, she was called in for assistance when L would not cooperate and on two others the teacher told L. she would need to go home early if she did not comply. Id. at 3-4. Time on task was initially 10 minutes. Id. at 4. She requires frequent breaks and rewards. It takes one hour to accomplish one-half hour of work. Id.

74. The Parents want L. to be provided with a community-based program staffed by teachers, paraprofessionals and related service providers who are not Board employees chosen by their independent consultant(s). Testimony of Mother. After perhaps several months of this program, they want L. transitioned into a fully mainstreamed (80% or more) program at the middle school. Testimony of Mother. Drs. Itzkowitz and Majure support the idea of such a program. Testimony of Drs. Itzkowitz and Majure.

75. This hearing, which was originally scheduled to occur in December 2007 and January 2008, was delayed for several months, primarily due to the Parties' requests for postponements. See Procedural Summary. There were eight scheduled hearing dates in December, January, March and May, which were postponed at the attorneys' requests, four of

them for illness. The Parents' attorney requested two postponements for mediation and two for other commitments. When hearing are canceled on short notice, rescheduling them often takes one month or more to find dates when parties, witnesses and attorneys are available. In addition, the Parents have not been willing to convene any PPT meetings to discuss placement options with the Board. Therefore, the Student remains in the interim placement agreed upon as stay-put by the parties. The Student's lack of instruction from November 15, 2007 has not been due to the actions of the Board.

76. The cost of the Parents' proposed program would be "absolutely astronomical" in comparison with the cost to the public school of placing L. in an out-of-district placement. Testimony of Ms. Van Deun. The Parents point to the testimony Attorney Terri DeFrancis who said that under Connecticut Statutes, Section 10-76g(b), the local school district's cost for a child in special education is 4.5 times the average per pupil expenditure. Testimony of Atty. DeFrancis. North Haven's average per pupil expenditure is \$10,144 this year. North Haven would be reimbursed by the State for costs in excess of \$45,648 per child. *Id.* Depending on state revenues, the reimbursement could be capped, so that it is prorated to towns. *Id.* The costs of the outplacements recommended by the PPT range from \$38,000 at Foundation School to \$41,000 to \$42,000 at High Roads. Testimony of Ms. Van Deun. Additional costs for transportation would have to be included as well. The amount would depend on whether there was already a van transporting other students to the outplacement school. *Id.* The costs of a program with private consultants with the program described by Drs. Majure and Luddy would be approximately \$45- \$75,000 for an experienced special education teacher and an experienced paraprofessional with a college degree (tutor) would be \$24,000 with no benefits included. The District paid Drs. Majure and Itzkowitz approximately \$70,000 (\$35,000 each) for their consulting work with L. *Id.* They spent a small number of hours at school (one or two per week for Dr. Majure). If the new consultants spent more hours working on L.'s program, the costs could be significantly higher. *Id.* There would be additional costs for related service providers. The total cost of such a "one-student school" would easily exceed several times the cost of High Roads or Foundation. *Id.* Whether it's paid by the District or the State, it is public funds.

CONCLUSIONS OF LAW

1. The Parties agree that the Student qualifies for and is entitled to receive a FAPE with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and IDEA, 20 U.S.C. Section 1401, et seq. They also agree that L. is a child with mental retardation (intellectual disability). 34 C.F.R. Section 300.8(c)(6).

2. 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. "IDEA requires only that school districts provide an 'appropriate' IEP, gauged by whether the IEP is 'sufficient to confer some educational benefit.'" *Id.* 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). The Court of Appeals has also

cautioned that meaningful education 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 (2d 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. v. Milford, supra at 1121. The Board has the burden of proof on the appropriateness of the 2006-2007 and 2007-2008 IEPs. Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998). In Connecticut, the party who requested a due process hearing has the “burden of going forward” with the evidence. Conn. Agencies Regs. Section 10-76h-14. The Parents, as the party who requested this due process hearing, have the burden of producing evidence in support of their claims.

3. Pursuant to the IDEA, a hearing officer presented with a complaint regarding a child’s special education program must make a decision “on substantive grounds based on a determination of whether the child received a free appropriate public education.” 20 U.S.C. Section 1415(f)(3)(E). Where parents allege a procedural violation under the IDEA, a hearing officer may find a denial of FAPE “only if the violation ‘(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.’” Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2001 (2007) (quoting Sections 1415(f)(3)(E)(i)-(iii)). See also 34 C.F.R Section 300.513(a). With the reauthorization of the IDEA in 2004, Congress made clear that a procedural violation under IDEA, in itself, cannot equal the denial of FAPE. As courts within this circuit have held since the 2004 amendments, “[p]rocedural flaws do not automatically require a finding of a denial of FAPE.” Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp.2d 415, 419 (S.D.N.Y. 2007).

4. 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 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 ...(1) meeting the child’s individual needs.” 20 U.S.C. Section 1414(d)(1)(A)(ii).

5. The IDEA requires that:

The local educational agency shall ensure that, subject to subparagraph (B), the IEP team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) [concerning additional evaluation data];

(IV) the child's anticipated needs; or

(V) other matters.

20 U.S.C. Section 1414 (d)(4)(A)-(B). The PPT met four times in September, October and November 2007, certainly more than the minimum once per year.

6. The IDEA also makes clear that the PPT must consider certain special factors when writing an IEP including, in relevant part, a child's assistive technology needs, 20 U.S.C. Section 1414(d)(3)(B)(V), a child's communication needs, 34 C.F.R. Section 300.324(a)(2)(iv) and a child's need for positive behavioral supports. 34 C.F.R. Section 300.324(a)(2)(i). The IEPs considered these factors as they pertain to this Student.

7. The Parents raised two claims of procedural violations in their January 14, 2008 amended statement of issues: first, a claim that a decision was made to expel L. and change her placement prior to the November 14, 2007 Manifestation PPT and second, that the Parents were told immediately after the suspension on November 2 that L. could not return to the public school and Parents would have a choice between expulsion and out-of-district placement in violation of the IDEA. A third procedural issue was raised during the hearing on February 15, 2008, when the Board was permitted to file a counterstatement of the issues. This claim is that the Board violated the Parents' and Student's IDEA procedural rights by not presenting its plans to change L.'s educational placement to the PPT and at the prehearing conference before presenting them at hearing. Each of these claims is unsupported by the written record, particularly the suspension letter from the school principal on November 5, the North Haven Public Schools Policy/Notices & Handbook and the November 14 PPT documents, all of which were provided to the Parents. Further, the record demonstrates that the Parents were provided with their procedural safeguards, participated fully in the November 14 PPT meeting and were represented by very able counsel. 34 C.F.R. Section 530(b) permits school personnel to "remove a child with a disability who violates a code of student conduct from his or her current placement to . . . a suspension, for not more than 10 school days." L. violated the student code of conduct by physically assaulting her tutor on November 2. The school was within its authority to suspend her from school for 10 days. In addition, 34 C.F.R. Section 535(a) permits a district to report a crime committed by a child with a disability to appropriate authorities. State law requires a school principal to report a physical assault on a teacher or employee who files a report. Conn. Gen Stats. Section 10-233g(a). A Manifestation Determination PPT meeting was held in a timely fashion. The Parents agreed that L. would not return to the elementary school and agreed to an interim placement. Although L.'s mother visited three schools, because of her objection to any out-of-district placement where L. would attend classes with students with disabilities, it is clear that she never intended to permit L. to attend any of these schools. The Parents did not permit L. to participate in any of the schools' intake processes that they knew was a necessary prerequisite to a decision by a private school to accept a particular student. The family cannot refuse to participate in the process and then claim that the school was not offering an appropriate program. The District completed as much of the process as it was able without the Parents' consent. The record is clear that the District was offering at the November 14 PPT meeting to implement L.'s IEP at a state approved private educational facility.

8. The first prong of the Rowley standard is not at issue with regard to the development of the IEPs for the 2006-2007 school year and for the 2007-2008 school year. L.'s IEPs for 2006-2007 and 2007-2008 contained the essential components under the IDEA and state law. The IEPs included: 1) a statement of L's present levels of [academic and functional] performance; 2) annual goals and short-term objectives; 3) the specific educational services to be provided; 4) an explanation of the extent to which L. would not participate in the regular education programs; 5) objective criteria and evaluation procedures for determining whether objectives are being met; and 6) the projected initiation date and duration of proposed services. 20 U.S.C. Section 1414; See Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (1998).

9. When evaluating the appropriateness of an IEP, courts must also consider whether the program is "individualized on the basis of the student's assessment and performance." 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)). Ensuring that a child with a disability is educated in the least restrictive environment ("LRE") is also necessary to the provision of FAPE. Whether the recommended program is administered in the LRE is one of the factors courts will consider when determining whether an IEP is reasonably calculated to provide a meaningful educational benefit. See M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ., 122 F.Supp.2d 289, 292 n.6 (D.Conn. 2000). The IDEA requires that school districts must make available a continuum of alternative placements for students who require special education and related services. 34 C.F.R. Section 300.115. This continuum must include "regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR Section 300.115(b)(1). The continuum must also "make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." Section 300.115(b)(2). "Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116." Section 300.42.

10. The Parents claim that the PPTs did not consider placing L. in regular classes with appropriate supports and services is not supported by the written record of the relevant meetings. Both the 2006-2007 and 2007-2008 IEPs provided that L. would spend a significant portion of her school day with non-disabled peers, 62% and 80+% respectively. In the 2006-2007 IEP, the Student required instruction outside the regular classroom in language arts, math and for related services. The Parents rely on the consent decree in P.J. v. State of Connecticut, Board of Education, Civil No. 291CV00180 (RNC) (D. Conn. 2002) for the proposition that L., as a class member (mentally retarded children who are not educated in regular classrooms) must be placed in regular classes 80% or more of the time. This agreement establishes bench marks for school districts, but it doesn't change the analysis required for an individual student's program. 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. 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). The 2006-2007 IEP placed L. in regular classes approximately 62% of the time. She received eight hours per week of academic instruction and four hours per week of related services outside the regular education classroom. The District employed consultants during that year to design yet another behavior plan for L. The Parents refused to consent to the implementation of appropriate plans during the 2006-2007 school year. The lack of a fully operational behavior plan supported the need for L. to be educated in a setting where additional behavior supports are provided. The ACES behavior plan, which provided for a time-out quiet room was not, as Parents continue to argue, a plan to put L. in a dark closet. It would have been a room modified to meet the requirements of L.'s plan and good behavior management practice. See, e.g., Boeme Indep. Sch. Dist., 25 IDELR 102 (SEA TX Nov. 22, 1996) (finding appropriate the district's use of a "time-out" room as part of its behavior intervention strategies for a student with, among other disabilities, autism); Marion County (FL) Sch. Dist., 20 IDELR 634 (Office of Civil Rights, July 22, 1993) (finding no disability discrimination on the basis of using "time-out" rooms). The District offered an appropriate behavior plan for the 2006-2007 school year. The Parents chose not to accept it. The District did, as required by IDEA, consider a wide range of supplemental aids and services to facilitate the child's placement in a regular classroom. The program provided for a combination of self-contained and mainstreamed classes, with appropriate instruction from special educators, related service providers and one-to-one support throughout the entire day from a qualified paraeducator. The Parents did not object to any of the IEP goals and objectives, except the behavior goal, which the team agreed to review after hiring a behavior consultant. Further, by June 2007, L. had made satisfactory progress on many of her goals and objectives. The Board's programs offered the right balance between special education and regular education. R.L. by Mr. and Ms. L. v. Plainville Bd. of Ed., 363 F.Supp.2d 222 (D.Conn. 2005). Hartmann by Hartmann v. London Cty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998) ("local educators deserve latitude in determining the individualized education program most appropriate for a disabled child"). In a case where the school district's and the Parents' expert witnesses disagreed, the federal court in this district stated that: "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent." A.S. and W.S. v. Trumbull Board of Education, 414 F. Supp. 2d 152 (D.Conn. 2006), citing A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 328 (4th Cir. 2004).

11. In an attempt to work with the Parents, the District had hired two more consultants at Parents' request. The District acceded to just about all of the Parents' requests. With regard to the 2007-2008 IEP, everyone, including the Parents, agreed that it was appropriate and L. was in regular classes for more than 80% of her day. Unfortunately, L. was not in school long enough to judge her academic progress on the IEP, but the behavior plan was not working, as evidenced by the escalation in L.'s serious behaviors in September and October, culminating with her suspension on November 2, 2007. The Parents blame the District for not properly implementing the behavior plan. Despite the opinion in Dr. Black's report that L. may become frustrated and angry about the differences between her and non-disabled peers in the regular education classroom, Dr. Majure developed a behavior plan for the 2007-2008 school year on the premise that L. wanted to be in the regular classroom setting. Dr. Majure acknowledged soon after the plan began to be implemented that this premise was not correct and

that the behavior plan needed to be revised. The District's alleged failure to have properly trained staff and to properly record behavior data even if proven, would not have changed this basic flaw in the plan. L. did not want to be in the regular classroom and she did not want to be with her non-disabled peers.

12. Conn. Gen. Stat. Section 10-220(a)(3) requires each local or regional board of education to maintain a safe school setting. L. was a danger to herself and others in the school environment and was not participating in her school program as of November 2, 2007. The District had the legal right and obligation to offer and pursue a placement in a smaller, specialized program that contained the supports that had been identified as necessary for L. to make educational progress. In addition, L.'s behavior was disruptive of the school environment. The District's recommendation on November 14, 2007 for L. to attend an out-of-district private, state approved special education program in Connecticut offered her FAPE in the LRE in accordance with the IDEA's requirements. This placement for the remainder of the 2007-2008 school year or until her behavior was stabilized and a program was developed in the District that could address her behavioral needs, would have provided her with FAPE. The Parents chose to retain L. in a tutoring program developed as a compromise stay-put IEP instead of accepting the more extensive educational services offered by the District. Their choice cannot be the basis for a claim that the stay-put tutoring and related services failed to provide FAPE. It is well-established that parents have no right to compel a certain program or methodology where the school offers an appropriate program (see Lachman v. Illinois State Bd. Of Educ., 852 F.2d 290, 297 (7th Cir 1988) (noting that Rowley does not allow parents to compel a specific program or methodology).

13. The Parents claim that the District did not provide AT necessary for the Student. "It is well established the District's obligation to provide assistive technology is limited to assistive technology which is necessary to provide a FAPE." Grant v. Ind. School District No. 11, 43 IDELR 219 (D.Minn. 2005). In other words, "participants at the meeting held to develop a child's IEP must determine whether, in light of a particular child's education needs, the public agency must make an assistive technology device and/or assistive technology service available in order for the child to receive a FAPE." Letter to Seiler, 20 IDELR 1216 (Nov. 19, 1993); see also Letter to Anonymous, 24 IDELR 584 (Apr. 11, 1996)(same). "The need for a specific assistive technology device/service must be determined according to the individual needs of the child." Letter to Hutcheson, 30 IDELR 708 (June 22, 1998). The District provided two AT evaluations at Parents' request by hiring consultants at ACES and was in the process of a third when the Student left school. The recommendations were implemented by the PPT. The voice dictation and other devices the Parents wanted were deemed inappropriate or unnecessary for L. Ms. Hoskins' opinions on the issue of augmentative communications were also persuasive in view of her many years experience as a speech and language pathologist. The IEPs were not inappropriate because of any unmet AT needs.

14. "It is well established that 'equitable considerations are relevant in fashioning relief' under the IDEA." M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Educ., 226 F.3d 60, 68 (2d Cir. 2000) (quoting Burlington v. Dep't of Educ., 471 U.S. 359, 374 (1985)). "Some circuit courts have held that appropriate relief may also include 'compensatory education,' or replacement of educational services that should have been provided to a child before. Reid v. District of Columbia, 365 U.S. App. D.C. 234, 401 F.3d 516, 518, 522 (D.C. Cir. 2005) (citing

cases).” P. v. Newington Bd. of Educ., 512 F.Supp.2d 89 (D. Conn. 2007). In Bruno v. Greenwich Bd. of Educ., 45 IDELR, 106 LRP 4075 (D.Conn. 2006), the Court stated that once procedural or substantive violations of the IDEA are found, the decision maker must consider whether the plaintiff is entitled to compensatory education and reimbursement for an independent evaluation. In this case, no procedural or substantive violations of IDEA have been found. Compensatory education, therefore, is not appropriate. The issue remains, however, whether the Hearing Officer should order L. to be placed in a specific program as both parties request. L. has been out of school for approximately 11 months, during which time she has received a small portion of the instruction she would have received in school, whether a public or out-of-district placement. The Parties agree that L. should attend the middle school and that she is not ready to be placed there at this time. The District argues that a state-approved out-of-district placement would provide the small, structured environment she needs to bring her behaviors under control so that she can transition to the middle school. The Parents want the Hearing Officer to order an elaborate array of independent consultants, educators and related service providers from an outside agency to make a program for L., all approved by the Parents. Such a program would be very costly and duplicative of services already available at the schools recommended by the District—High Roads, Foundation School or the Gengras Center. These schools can also provide assistance to the District about how to transition a student from the out-of-district placement to the regular school environment. Requiring a school district to hire all of the consultants and specialists requested by the Parents “to educate one child would be tedious, burdensome, and difficult. It is for this reason that regional day schools were established.” Lyford Ind. School Dist., 280-SE-0405 (Texas SEA, Nov. 29, 2005). The same can be said with regard to state-approved out-of-district placements.

FINAL DECISION AND ORDER

1. The Student's 2006-2007 IEP was appropriate.
2. The Student's 2006-2007 IEP provided the Student with regular classes for the maximum extent appropriate given her individual needs.
3. The Student's 2007-2008 IEP was appropriate.
4. The Student's 2007-2008 IEP was appropriate since it provided the Student with regular classes for 80% or more of the school day.
5. The 2007-2008 IEP could not be implemented as written in September 2007 because the Student's behavior significantly impeded her ability to participate in regular classes.
6. The Parents' procedural rights under IDEA were not violated since there was no decision by the District to expel the Student or any decision to change the Student's placement prior to the November 14, 2007 PPT meeting.
7. The Parents did not present credible evidence to prove that they were told on November 2 that L. could not return to school and that the Parents had only two options: expulsion or out-of-district placement.
8. The PPT shall convene within 15 days of this decision and implement the recommendation of the November 14, 2007 PPT to place the Student in a state-approved out-of-district placement, which has available space for her and can offer her a program based on her current educational needs.