

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Trumbull Board of Education

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Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUES:

1. Is the program offered by the Board for the 2010-2011 school year appropriate and does it provide the Student with a free and appropriate education (FAPE) in the least restrictive environment (LRE)? If not:
2. Is placement of the Student for the 2010-2011 school year and the summer of 2010 at the Connecticut Center for Child Development, Inc. (CCCD) appropriate and did it provide the Student with a FAPE in the LRE?
3. Is the extended school year program (ESY) offered by the Board for the summer 2010 appropriate and did it provide the Student with a FAPE in the LRE?
4. Is the transition plan offered by the Board appropriate?
5. Is the functional behavioral analysis (FBA) appropriate to provide the Student with an appropriate behavior intervention plan (BIP)?
6. Should the Board reimburse the parent for the evaluations, observations and consultations by the Parents' experts?

FINAL DECISION AND ORDER

SUMMARY and PROCEDURAL HISTORY:

The Student is a student who has been identified with Autism and is entitled to receive a free and appropriate public education ("FAPE") as defined in the Individuals with Disabilities Education Improvement Act (IDEIA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. At a PPT meeting, the Parents rejected the program offered by the Board for the 2010-2011 school year.

The Parents and the Board disagreed on the proposed IEP and the services to be provided. The Parents requested outplacement at the PPT and wrote a letter to the Board that they would be seeking outplacement at CCCD effective June 2010. Their request was denied and the Parents filed a Due Process request on July 21, 2010. The Parents enrolled the Student at CCCD on June 28, 2010.

PROCEDURAL HISTORY:

This matter was heard as a contested case pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedures Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

On or about July 21, 2010, the Board received notice of the Parents' request for due process. An impartial hearing officer was appointed on July 21, 2010 and a pre-hearing conference was held on July 29, 2010. At the pre-hearing conference the Parent requested to amend the request for due process. There was no objection by the Board and the request was granted. The parties were also notified the amendment would alter the IDEIA timeline that had been in effect with the original notice of due process to the Board. The Parent amended the due process request.

Mediation was held on August 23, 2010 and did not result in an agreement. The matter proceeded to hearings on the following dates September 16, 17, 23, and 24, 2010; November 5, 11, and 30, 2010; December 1, 6, and 17, 2010; January 14 and 24, 2011; February 11 and 18, 2011; and March 7 and 23, 2011.

The Board filed a Motion to Observe the Student at his current program. The Parents filed a timely motion objecting to the observation. The Motion to Observe the Student was denied. At the commencement of the hearing the parties agreed that the 2009-2010 school year shall not be an issue for this hearing.

This Final Decision and Order set forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the Summary and Proposed Findings of Fact actually represent conclusions of law, they should be so considered by the Hearing Officer and vice versa, SAS Institute, Inc. v. S&H Computer Systems, Inc., 605 F. Supp. 816 (M.D. Tenn. 1985); Bonnie Ann F. v. Callallen Ind. Sch. Bd., 835 F. Supp. 340 (S.D. Tex. 1993).

At the request of the parties, in order to accommodate the mailing of a final decision and order after the hearing dates and to allow additional time for the mediation, the date for the mailing of the Final Decision and Order was extended.

The date for mailing the Final Decision and Order is June 14, 2011.

FINDINGS OF FACTS:

1. The Student is eligible to receive special education and related services as a student with Autism. The Student had been a student at CCCD since March 2003. The school district paid for the placement of the Student at CCCD for the 2007-2008, summer of 2008

and 2008-2009 school year. The placement of the Student at CCCD was primarily for aggressive behaviors. (Testimony of Father, Board's Exhibit ¹-23)

2. In 2001, the Student was first evaluated and diagnosed as having autism by Dr. Michael Powers. In his evaluation, the Doctor recommended CCCD as an appropriate program for the Student. The Student was found to have limited language skills and was in need of an extensive program of Applied Behavioral Analysis (ABA). There was a concern for the Student's behavior. The Student was not enrolled in CCCD and was maintained at the Board's school. This was one six of evaluations performed by the Doctor. The Doctor did not consult the school staff for this evaluation. (Testimony of Dr. Michael Powers, Testimony of Father, B-17)

3. In January 2003, the Student once again was evaluated by Dr. Powers. The Student exhibited disruptive behavior and was putting things in his mouth and ingesting them. The Doctor recommended immediate enrollment in a full-day, year-round special education program specializing in children with autism. He also recommended an immediate functional behavior analysis (FBA) and treatment plan of the exhibited behaviors. The Doctor also found an improvement in the Student's communication and decoding skills and recommended that the Parents pursue an eligibility determination from the Department of Mental Retardation. This determination would open the door for access to specialized family support funds. In March 2003 Dr. Powers performed an educational update to his January evaluation. Once again the Doctor recommended that the Student should be placed in a highly specialized placement like CCCD. On or about March 27, 2003, the Parents' unilaterally placed the Student at CCCD. The Student's behaviors placed him at significant risk physically and, as a result of the behaviors, possibly in need of a more restrictive educational placement. (Testimony of Dr. Michael Powers, B-39, B-45, B-46)

4. Since an early age the student has demonstrated a behavior problem. The Parents placed the Student at CCCD because of a "behavior breakdown". The Student had to be held down and urinated everywhere. The Student's behavior improved when he was placed at CCCD. The Student demonstrated behavior issues at home and in the community setting. (Testimony of Father)

5. In February 2006, Dr. Michael Powers re-evaluated the Student and found the standard measures of intellectual functioning showed the Student to be well below age expectations. The Student continued to need a full year highly specialized educational program and recommended that the Student's speech and language services and occupational therapy services be incorporated into his IEP. The Student demonstrated very significant prompt dependencies. During the re-evaluation, the Student would begin a response and look for attention to proceed further. The Parents were the only informants on the Vineland II Adaptive Behavior Scales. (Testimony of Dr. Michael Powers, B-74)

6. At the June 5, 2007 PPT meeting, the Parents requested placement of the Student at CCCD for the 2007-2008 school year. The Board agreed to fund the placement. The PPT agreed to provide the Student with 30 hours per week of services to be implemented at CCCD. During the 2007- 2008 school year, the Student continued placement at CCCD by agreement of the Parent and the District. CCCD was meeting the Student's needs but was

¹ Hereafter Board's Exhibits shall be noted as "B" followed by the exhibit number

not in compliance with the IDEIA mandate of LRE. At the June 5, 2007 PPT, the team noted that the Student had made major improvement in decreasing his stereotypical behavior and prompt dependency from staff at CCCD. The team suggested exploring a return to the Student's home school and involvement in the District's community. The Parents reported that the Student had made positive progress and was participating in trips to the swimming pool and movies. (Testimony of Father, B-89)

7. CCCD is a private special education school approved by the State of Connecticut that specializes in the disability of autism utilizing the methodology of Applied Behavior Analysis ("ABA"). The school is specifically structured to address the sensory, behavioral and communication issues consistent with autism. Programs are designed and progress is reviewed through daily program data and regular, formal, objective testing, including such instruments as the Assessment of Basic Language and Learning Skills (ABLLS) and the Checklist of Adaptive Living Skills (CAL S). The IEP is developed from data obtained from these formal assessments. CCCD employs highly qualified and supported staff with every staff member extensively trained in ABA methodology. Students are in classrooms with certified special education teachers and an aide who is certified or in the process of certification as a behavioral analyst. Data is entered in a computer and can be drawn and reviewed from any computer in the network. There are multiple layers of supervision at the building level and frequent team meetings to insure integration of the program. A Board Certified Behavioral Analyst (BCBA) is always on site and assigned to each classroom. A certified special education teacher is in the classroom, and trained staff rotate among students in 1 to 1-1/2 hour shifts for generalization to avoid "staff specific behavior." Generalization for home and community are integral to the program with daily living skills addressed on-site with facilities for cooking, showering, and mock clinics for dental or haircut desensitization. Parent counseling and training is available in the home as necessary, based on data taken in the home and analyzed. CCCD offers an extended day program after school, which the Student has historically attended, to address goals and objectives including community outings and leisure activities. ESY at CCCD does not differ from the regular year program. CCCD has outreach programs for school districts and consults and helps train staff. (Testimony CCCD BCBA, B-106, Parent's Exhibit² 76, P-77, P-78)

8. On or about February 2008, at the request of the Parents, Dr. Powers performed another psychological evaluation of the Student. At this time, the Student had been enrolled at CCCD for 5 years. The Doctor performed the Stanford-Binet Intelligence Scale 5th Edition and found that the Student had a Non-verbal IQ of 42, Verbal IQ of 43 and a Full Scale IQ of 40. The Doctor noted that an FBA and BIP had been performed in order to address the Student's vocal stereotype behavior. The Student also demonstrated motor stereotype behavior in the form of running back and forth, hand flapping and bouncing on his bed and on chairs. The Student demonstrated substantial cognitive disability. The Student's social skills standard score remain the same as the 2006 evaluation. The Student still demonstrated a strong need for prompting. It was recommended that CCCD change from using edibles as the primary reinforcement to using tokens. The Student was having problems with consistent patterns of elimination at night. The Doctor recommended the Parents eliminate all naps to ensure that the Student have a more consistent pattern of sleeping. CCCD plan for reducing stereotypy included a plan that if the Student did not respond to a known demand the staff would physically prompt him through the task, present

² Hereafter Parent's Exhibits shall be noted as "P" followed by the exhibit number.

the task again and continue until the Student completed the task. (Testimony of Dr. Michael Powers, B-99, B-93)

9. In the February 2008 evaluation, Dr Molteni participated in the evaluation and performed the cognitive piece. The Doctor noted that the Student's motor stereotypy was not affecting his academics. Data was only being taken on Student's vocal stereotypy, not the motor stereotypy. The Doctor was of the opinion that a onetime per month parent training was appropriate. The Department of Social Services should provide services in the home. Incidents of Student behavior were being kept. The Student got loud during the observation but this did not interfere with the other students in the class. The Doctor was aware of the planned transition of the Student from CCCD to the District school. Once the Student arrived at the district school the Doctor recommended that they needed to look at his behaviors in the new setting. The PPT needs to conceptualize and develop the Student's transition plan to address goals and objectives that will support adaptive living skills with community based supports. (Testimony of Dr. Molteni, P-2 and P-3)

10. During the 2007-2008 school year from 12/07 to 3/08, the Student made progress. The Student had mastered 16 objectives and had made satisfactory progress in 27 objectives. Two of the objectives that the student received satisfactory progress were classified as behavior reduction objectives. Data collected showed a downward trend and this resulted in an increase in the Student's exercise breaks. The Student was able to complete a 12 step task analysis for remaining on task while using the bathroom. The Student was then scheduled to start working independently on going to the bathroom. Two objectives that had not been implemented were in speech and language. There was no FBA performed of the Student while at CCCD. (Testimony of District's BCBA, B-101)

11. At the February 2008 PPT, it was agreed to conduct an occupational therapy (OT) and assistive technology (AT) evaluation of the Student. The evaluator did not utilize standard testing measures for school performance because the Student's disability was so severe he would have scored 3 standard deviations below average if tested. In comparison to the prior 2004 OT evaluation, the Student would hold things longer and more tightly. The evaluator noted that the Student had made gains in self-care skills as well as using the bathroom independently. There had been no progress in the area of handwriting, copying simple shapes and manipulating writing tools. OT services were not available at CCCD. The OT therapist also conducted further consultations in the area of augmentative communication and tested 2 devices, the I-Chat and the Dynavox M-3. The I-Chat screen was too small and difficult to see. Using the Dynavox M-3, the Student had difficulty with the symbols and also was not available for testing in the District. The predecessor to the M-3, the Min-Mo, was available and the evaluator recommended its use. (Testimony of Ms. Kardos, B-59, B-100)

12. In June 2008, the Board proposed that the Student complete his summer program at CCCD and enter the district's SRP in the fall of 2008. The Board attempted to schedule a transition meeting to plan the transition to the Board's program. The Parents would not attend the meeting and requested a PPT. They were under the impression that the issue of transition was only being explored and not a formal proposal. (B-112)

13. The Special Education Teacher of the Board's Specialized Resource Program (SRP) did an observation of the Student at CCCD in order to evaluate his ability to transition to the

District's school for the 2008-2009 school year. She observed the Student in a 1-1 environment being successful, responding and being able to respond using edibles as prompts and the use of physical reinforcements when asked by the Student. The Student was not involved with non-disabled peers. The staff at CCCD seemed to ignore self-injurious behavior. The observer felt that the Student would be successful transitioned to the District's school for the 2008-2009 school year. (Testimony of Special Education Teacher of the SRP)

14. In June 2008, Dr. Molteni observed the Student at CCCD. The Doctor did not observe any aggressive tantrum behavior. He observed the District's planned SRP for the Student. The program was to be supervised by the Institute for Professional Counseling, which specialized in setting up autism programs. He observed that the program was responsive to individual student changes and managed more significantly impaired students in the coming years, but it had not yet developed the instructional methodologies and responsive system necessary to address the Student's complex needs. The Student needs a BCBA involved in his programming and ABA throughout the entire day. The Institute for Professional Counseling was not going to continue their involvement. Dr. Molteni did not agree with the Student being transitioned to the District's SRP classroom. (Testimony of Dr. Molteni, P-4)

15. The SRP in the District was an ABA-based program. The Student would receive direct instruction in reading, math and independent living skills provided by a special education teacher and an ABA paraprofessional. The Student would also receive speech and language therapy and occupational therapy by certified and licensed staff. (B-112)

16. On or about November 2008, the Parents informed the Board that they were not in agreement with the transition of the student to the District's school. The Parents requested that Dr. Michael Weiss consider the utility of the SRP program given the Student's developmental status and to comment on strategies that may be useful to the Student. The Board agreed to allow the Doctor to observe the Student. The Doctor recommended the Student's transition to the District's school. The observer found that the Student was very prompt dependent and would benefit from a more typical environment. (Testimony Dr. Weiss, B-16)

17. During the 2007-2008 school year, the Student, out of a total of 34 objectives mastered 24 and received a code of other in 10. In his reduction of stereotypy behavior, his episodes ranged from 13-185 each day. The data collected showed that the Student was on a downward trend with most days falling below 55 episodes per day. Although this was progress, his skill acquisition was slower than anticipated and therefore received a code of other. In his bathroom objective, the Student was becoming too prompt dependent and waiting too long to go to the bathroom and received a progress code of "other". (B-111)

18. In October 2008, CCCD completed a Bracken language evaluation of the Student. This evaluation resulted in a list of language and concepts that the Student knew and did not know. This would assist the PPT to develop future academic goals and objectives for the Student. In May 2009, CCCD completed the Checklist of Adaptive Living Skills (CALs). This report provided an indication of the Student's current level of performance in reference to his personal, home, community and employment living skills. The student's employment living skills were not evaluated. (B-142, B-145)

19. On or about November 2008, the Parents filed for due process. The parties mediated the matter and reached a settlement that resolved all issues. The Board agreed to maintain the Student at CCCD for the 2008-2009 school year and included a transition to the district's school commencing in March 2009 and through the 2009 ESY. The transition plan was that the Student would attend the district's program for one to two days per week and the balance of his week spent at CCCD. Staff from CCCD was on site at all times when the Student was attending the program at the district's school. The goal of the district was to "mimic" the CCCD program. All parties acknowledged progress during this one or two day-per-week time in Trumbull when CCCD was on site full-time. (Testimony of Ms Hearn, B-138, B-144)
20. The SRP program was a self contained program with 6 students. The student teacher ratio was 1 to 1. The Student received 45 minutes of instruction each day in reading, math, language arts and independent living skills instruction. The Student participated in the mainstream setting with his para for homeroom, lunch, unified arts and pro-career training. The Student received 3 hours per week of speech and language therapy, 2 hours per week of occupational therapy, 45 minutes per week of adaptive physical education, about 6 hours each day of behavioral support and 45 minutes each week of community participation. The BCBA provided services for 6 hours each week. Prior to the transition, the student received 3. (P-28, B-151)
21. In December 2008, CCCD presented a progress report of the Student from 9/11/08 to 12/11/08. The Student's IEP contained 38 objectives. The report showed that the Student had mastered 13 objectives and had made satisfactory progress in the other 25 objectives. The Student had mastered his 19th objective: independent use of the bathroom. This was done with the use of edible tokens. The objective would be continued without the use of edible tokens. The data showed that the Student's self-injurious behavior (SIB) was within a range of 0-39 instances. (B-141, P-66, P-67)
22. Ms. Hearn, BCBA from ACES, was retained by the Board in March 2009. She was hired to spend 6 hours on the Student's program and observe the Student. Stereotypy was the only behavior she observed. She observed prompt dependency when Student had to do laundry. If Student banged on a table, the staff from CCCD would back the Student away from the group setting and when backed in he got upset but not as strongly. She observed in the spring of 2009 and summer of 2009 mal adaptive behaviors, repetitive motions, hand play, touching, grinding teeth and exaggerated movements. In March 2009, the Student's behavioral intervention plan was updated to include SIB.(Testimony Ms. Hearn, P-78)
23. In March 2009, the Student began to transition to the SRP classroom. He was accompanied by staff from CCCD and the CCCD staff was present to observe the SRP staff implement his ABA programs and behavioral interventions. The Student progressed well in his goals and objectives during the transition. The Student began attending the SRP classroom full time in September 2009. (Testimony of BCBA, SRP Special Education Teacher, Ms Hearn)
24. On or about November 3, 2009, the Parent notified the Board that she was taking the Student to Dr. Powers. The Student was again evaluated by Dr. Powers on or about November 12, 2009. The Doctor noted that since the transition to the district's school, the Student displayed a significant increase in the frequency and severity of problem behaviors.

The Student displayed an increase in hand banging, stomping and tantrums. On the Daily Living Skills domain and sub domain, the student fell to the low range. Skills regression was noted in all domains. In the Socialization domain, he also fell to the low range. The increase in the severity and frequency of the Student's behavior interfered with his educational program and placed him and others at risk, and interfered with and limited his ongoing developmental functional communication, academic skills, daily living skills and adaptive coping strategies. The Doctor noted that there had been an insufficiency of data collected and an insufficient analysis of his many topographies of problem behaviors. The Doctor noted an insufficient level of BCBA support for the Student. The student requires a placement in an intensive and specialized full year program for individuals within the Autistic spectrum. The Doctor was of the opinion that the program at the Board's school was not appropriate for the Student. (P-57 pg 10 & 18, Testimony of Dr. Michael Powers, P-28)

25. Vineland II Adaptive Behavior scale from 2001 to 2009 as reported by Dr. Powers:

Domain	2001 Age Equivalent	2003 Age Equivalent	2006 Age Equivalent	2008 Age Equivalent	2009 Age Equivalent
Communication:	2yrs,2 mths	2yrs,6 mths			
Receptive			2yrs,6 mths	2yrs,6 mths	2yrs,2mths
Expressive			2yrs,3 mths	2yrs,6mths	2yrs,2 mths
Written			5yrs,6 mths	4yrs,11mths	5yrs,10 mths
Daily Living Skills:	2yrs,3 mths	2yrs,5 mths			
Personal			3yrs,6mths	3yrs,9 mths	3yrs,6 mths
Domestic			5yrs,6 mths	5rs,6mths	5yrs,5 mths
Community			4yrs,7 mths	4yrs,6mths	3yrs,7 mths
Socialization:	1yrs,6 mths	1yrs,7 mths			
Interpersonal Relationships			11months	1YR 1 mth	1yrs,6 mths
Play and Leisure			9 months	1 year	1yrs,2 mths
Coping Skills			2yrs,3 mths	2yrs,10 mths	2yrs,10 mths

(B-17, B-39, B-75, B-99, B-152)

26. The transition was completed and the Parents noted a change in the Student's behavior once the Student was fully transitioned to the Board's school. The Student demonstrated more aggressive and disruptive behavior in the home and the community. The Student had more toileting incidents and had difficulty sleeping and an increase in prompt dependency. (Testimony of Parents)

27. The district staff made a home visit and made suggestions for after-school routines that might assist the Parents with the Student's aggressive episodes at home. A PPT was held on October 1, 2009 to review the Student's program. The PPT offered Physical Management Training for the Parents to enable them to respond to the Student's aggressions at home. (Testimony of SRP Special Education Teacher, P-23)

28. During the 2009-2010 school year, the Student spent time with non-disabled peers. The Student ate in the cafeteria and participated in workshops with non-disabled peers. They also came into the Student's classroom and he responded well with other students. In the community, the Student interacted with non-disabled peers. It took a full year for the Student to access all rooms in the middle school. ((Testimony of Special Education Teacher)

29. On or about December 2009, the Parents received the final progress report from the Student's private speech and language pathologist. The Student had been receiving three 45 minutes sessions each week and this had been reduced to one 45 minute session per week after the Student had been transitioned to the SRP classroom. The pathologist noted that the Student had been demonstrating an increase in verbal preservation. These are requests mainly for bathroom. They were interfering with the Student's progress during the September to December 2009 period. The pathologist also noted aggressive behavior during the Student's therapy. These occurred 3-4 times during the same period and redirection was in the form of a time out. Relating these aggressions to the Parent, she was informed that the aggressions are seen also at home but at a greater intensity. (P-29)

30. The Occupational Therapist testified that the Student's behavior during his OT sessions was manageable. There were no objectives for computer prior to her working with the Student. The Student mastered his OT goal for the 2009-2010 school year. He has participated in fine motor tasks involving functional handwriting and cutting. The Student can cut in a straight line with ½ inch accuracy. There were new objectives created for the 2010-2011 school year and sensory integration was built into the Student's program. (Testimony Occupational Therapist, P-23, P-191, B-194)

31. The Student's Speech and Language Pathologist recommended 3 hours per week for the 2010-2011 school year. It was an administrative decision to go to total hours. The Student did not master any speech and language goals but did master some of its objectives. (Testimony of Speech and Language Pathologist, B-191, B-216)

32. On or about January 2010, Dr. John Molteni, conducted a school observation of the SRP classroom. The Doctor reviewed the data related to the Student and found that various topographies of behavior showed increase over time while others that had been at a higher level had decreased. Looking at the totality of the topographies of behaviors it showed an increase trend. The Doctor was not given and did not ask for all of the graphic data but was verbally given the information by the staff. There had been no additional analysis of the Student's behavior since his return to SRP classroom. He was not shown an FBA of the Student and recommended that one should be done. The Doctor was of the opinion that the SRP classroom was a good program but did not meet the needs of the Student. The Student should not be transitioned to the Board's high school. (Testimony of Dr Molteni, P-30)

33. The BCBA from CCCD has been involved with the Student since 2003. In the 2009-2010 school year the Student was transitioned to the Board's school but in June 2010 the Student was returned to CCCD. While the Student was at CCCD, they did not provide any direct service in the home, but provided parent training each month at CCCD. (Testimony CCCD BCBA, Testimony of Dr. Powers)

34. The Student was not able to interact well with peers; pairing with higher functioning peers was begun and the Student started to follow through with responses to peers. The Student went out to the supermarket one time each week and mall, movies or aquarium 1 time each month. The Student responded well but if he was having a bad day, the special education teacher would not take him out. On the outings, the teacher worked on Student's goal of things to get and make change. The primary way this was communicated to the Parents was through the log book. Tantrum behaviors were interfering with progress and were the only behaviors that interfered with his general education classes. They lasted more than 2 minutes. Parent was not provided with the Behavior Support Plan created in May 2010 nor did they provide any input to the BIP. The Student was not allowed to return to the Kennedy Center because of his behavior. There was no transition plan for the new setting at the high school. The Student needs behavioral regulation in order to be successful in the community. (Testimony of SRP Special Education Teacher)

35. The program proposed by the Board for the Summer 2010 and the 2010-2011 school year is in many respects consistent with the IEP proposed for the 2009-2010 school year. The Student would continue in the SRP classroom at the Board's high school. This was a new program at the high school that had not been tried there before. Goals and objectives were developed for the Student in reading comprehension, calendar skills, language arts, math, functional language, gross motor, fine motor, pre-vocational and supported employment, independent living, daily living skills and functional academics. There were no formal evaluations done for this PPT only curriculum based evaluations. There was no transition plan for the new setting in the high school. A visit to the high school was not possible because the building was under construction. It was only possible to walk outside the building. (Testimony of SRP Special Education Teacher, B-194)

CONCLUSIONS OF LAW:

1. It is undisputed that the Student is entitled to receive special education and related services to obtain a free and appropriate public education (FAPE) under the Individuals with Disabilities Improvement Act (IDEIA), 20 U.S.C. §1401 et seq. FAPE is defined as special education and related services that is provided at public expense, meet the standards of the state educational agency, include an appropriate school education, and are provided in conformity with the IEP. 20 U.S.C. §1401(8).

2. The proposed program or placement must be reviewed in light of the information available to the PPT at the time the IEPs were developed. B. L. v. New Britain Bd. of Educ., 394 F. Supp. 2d 522, 537 (D. Conn. 2005).

3. The standard for determining whether FAPE has been provided begins with the two prong test established by the Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). First, the procedural requirements of the IDEA must have been met by the school district. Second, the individualized educational program must be reasonably calculated to enable the child to receive educational benefit. Since Rowley, courts have clarified the requirements of FAPE to hold that individualized educational programs offered to children with disabilities must provide more than a trivial educational benefit. (See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), cert denied, 488 U.S. 1030 (1989) .

4. Where parents allege a procedural violation under the IDEA, a Hearing Officer may find a denial of FAPE if the violation 1) impeded the child's right to FAPE; 2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE; or 3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E); 34 CFR § 300.513(a); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2001 (2007).

5. The Parent alleges various procedural errors by the Board including: failure to share behavioral documents with the Parents and failure to obtain input on, or consent for procedures in the FBA or BIP in developing the IEP for the 2010-11 year; failure to respond to the Parents' urgent concerns about behaviors and prompt dependency; failure to schedule, then abruptly cancelling the annual review PPT. These alleged violations do not reach the level of procedural error on the part of the Board to constitute a denial of FAPE to the Student. The Parents allege that using total yearly hours instead of hours per week of service for related services in the 2010-2011 school year is a procedural violation which results in a violation which denies the Student FAPE. Public Act 10-15 mandates a school year of 180 days of schools. This would translate to 36 weeks of school. The Board alleges that the Student's 2010-2011 IEP which states 90 hours of speech and language services translates to 3 hours per week. This would mean that the Student would receive services for only 30 weeks. This is the ambiguity that the parent alleges violates FAPE. This ambiguity is not fatal to the IEP since testimony clearly stated that the level of services to the Student would be maintained at the 2009-2010 school year and the Student would receive 3 hours of speech and language services, 2 hours of OT services and .75 hours of adaptive PE. The Board should clarify the IEP to reflect the weekly services. Lump sum service hours are appropriate when they are access-based accommodations and it is not reasonable to predict the amount of time the student would actually use the accommodation. J.L. v. Mercer Island School District, 575 F.3d 1025, 52 IDELR 241 (United States Court of Appeals, 9th Cir. (2009)) Amended by the Court at 592 F.3d 938, 53 IDELR 280 (United States Court of Appeals, 9th Cir. (2010)).

6. In addressing the 2nd prong of *Rowley*, IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP. The Supreme Court, however, has specifically rejected the contention that the "appropriate education" mandated by IDEA requires states to "maximize the potential of handicapped children." Walczak v. Florida Union Free School District, 27 IDELR 1135 (2d Cir. 1998), citing *Rowley*, supra. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* The goal of IDEA is not to maximize a special education child's potential, but rather to provide access to public education for such children. K.P. v. Juzwic, 891 F. Supp. 703, 718 (D.Conn. 1995) This access is considered a "basic floor of opportunity" for the students. Banks v. Danbury Board of Education, 238 F. Supp. 2d 428 (D. Conn. 2003).

7. There is no one standard for determining what constitutes a meaningful educational benefit. The Student's capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit to the child. See, e.g. *Hall*, 774 F.2d at 635. Objective factors such as passing marks and advancement from grade to grade can be indicators of meaningful educational benefits

but are not in and of themselves dispositive. See, e.g., Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1120 (2nd Cir. 1997).

8. The Board states that the Student's stereotypes, "will continue to manifest themselves for the foreseeable future and that with appropriate instructions, the Student is able to acquire skills despite the presence of these behaviors." (Board's Post Trial Brief pg. 33) Although it is probably true that the Student's behaviors will continue in the foreseeable future, when the behaviors affect the ability of the Student to make progress they need to be addressed (Findings of Facts # 24 & 34), but not necessarily with behavioral goals. A district is required to consider strategies, including positive behavior interventions. Academic progress in of itself does not establish receipt of FAPE. The fact that a Student makes academic progress despite his severe behavioral problems indicates that he is receiving an educational benefit. Lathrop R-II School District v. Grey, 54 IDELR 276 (8th Cir. 2010) cert denied 11 LRP 3206 (U.S. 01/18/11). The IEP does not require behavioral goals and in this matter the IEP for the 2010-2011 school year does reference the Student's BIP for minimizing the Student's behaviors and stereotypes that would interfere with the Students academics as required by IDEA.

9. There is no specific reference in the IEP about how to deal with interfering behaviors at home. A student's behaviors at home are not in and of themselves a sufficient reason to state that the IEP does not provide the Student FAPE. The IEP must merely address those behaviors that impact the Student's ability to benefit from his educational program or that interfere with the learning of others. The Student's IEP does focus on what can be done in the environment that the school district can control. The Student has a BSP that addresses behaviors that are known to manifest throughout the school day. The BSP contains specific steps to decrease the Student's interfering behaviors. The Student's annotated IEP for the 2009-2010 school year show that the Student was benefiting from his educational program and even though as the Parents state his behaviors at home had deteriorated, they did not impede the Student from making progress in his IEP. This same BSP would have followed the Student to his new program for the 2010-2011 school year and would have addressed behaviors that are known to manifest through the school day. The Board had offered the Parent Physical Management Training. (Findings of Facts # 23)

10. IDEA also requires that the IEP planned for each child contain, beginning at age 14, a statement of the transition service needs (U.S.C. Section 1414(d)(1)(A)(vii). 34 C.F.R. 300.43 (a) Transition services means a coordinated set of activities for a child with a disability that--

- (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes--
 - (i) Instruction;
 - (ii) Related services;
 - (iii) Community experiences;
 - (iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

§300.347(a)(7), which requires parents of a child with a disability to be informed about their child's progress at least as often as parents of nondisabled children and for the report to include information on the extent to which the child's progress is sufficient to enable the child to achieve the goals by the end of the year.

Section 300.29(a) defines transition services as a "...coordinated set of activities for a student with a disability that - (1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) Is based on the individual student's needs, taking into account the student's preferences and interests; and (3) Includes - (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and functional vocational evaluation. 34 C.F.R. Section 300.29(b) states that "Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education." In addition, 34 C.F.R. Section 300.347(b)(2) requires the statement of transition service needs to include, if appropriate, a statement of interagency responsibilities or any needed linkages.

11. The transition services (special education and/or related services) that the Student needs in order to move from school to post-school activities, which include independent living and employment or postsecondary education, must be identified. Then, the question becomes whether the school district has provided the appropriate, individualized transition services required by the Student. The transition service plan is not an immovable rock that cannot be changed, but is a work in progress that during the course of time changes as the Student's behavior and growth academically, socially and in daily living skills will require fine tuning. At the present time the Student's transition service plan is appropriate.

12. While the IDEA does not require districts to ease transitions between educational environments, some children may require transition plans to receive a meaningful educational benefit. Maine Sch. Admin. Dist. #61, 49 IDELR 264 (SEA ME 2008). Children with autism often have great difficulty with changes in their daily routines. The Student has clearly demonstrated that transitions and changes are difficult for him to manage. It is simply not reasonable to expect that this Student, who has consistently experienced significant difficulty in coping with even minor changes in his daily routine, could just arrive at the school on the first day of high school and cope successfully with all the newness and strangeness inherent in that situation. The student requires a transition plan to the high school aligned with this start of this new chapter in his life. The district has not considered the student's individual needs when it developed an IEP that did not address how to handle his transition to the high school. A simple visit to show him the grounds of his new school is not sufficient. At the very least a similar plan as was done when the Student transitioned from CCCD to the district's middle school might have been sufficient. The ESY for the summer of 2010 should have included a means of transitioning the Student while at the same time ensuring that the transition would not be a regression. I also agree with Dr Powers that there is an insufficient

level of BCBA support for the Student. These deficiencies in his IEP would not allow the Student to receive FAPE in his new environment.

13. This does not mean that the Parents' remedy of a unilateral placement at CCCD is the solution or would be the appropriate placement for FAPE in the LRE. CCCD does not meet the LRE of the IDEIA. The Student can be educated with children who are not disabled. The severity of the Student's disabilities may impede him from receiving his academic classes in the mainstream setting but participating in the lunchroom and unified arts, homeroom and adaptive PE would allow the Student to the maximum extent appropriate to be with non-disabled peers. The placement at CCCD is not the LRE for the Student.

14. In order for the Student to receive a program that provided him with meaningful educational benefit, the Parents unilaterally placed him in the school the Board had funded for the past two years. This placement, CCCD, although not the LRE, enabled the Student in the interim to receive the educational benefit that the Board's program would not provide. "[W]hen the public school fails to provide an appropriate IEP, tuition reimbursement may be made to students placed in private schools that specialize in educating students with learning disabilities... The least-restrictive environment requirement does not bar reimbursement... An appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement... the test for the parents' private placement is that it is appropriate, and not that it is perfect. Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84-86 (3d Cir. 1999). Whether the Parents are entitled to be reimbursed for the costs of private placement turns on two distinct questions: whether the challenged IEP was inadequate to provide the child with a FAPE and whether the private educational services obtained by the Parents were appropriate to the child's needs. Student v. Greenwich B.O.E., CT DOE Case No. 06-005, (6/16/06) (citing M.C. v. Voluntown Bd. of Ed., 226 F.3d 60, 66 (2d Cir. 2000)). As previously stated the IEP for the 2010-2011 school year was not appropriate.

15. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL ORDER AND DECISION:

1. The program offered by the Board for the 2010-2011 school year is not appropriate.
2. The program at CCCD is not appropriate and does not provide the Student with a FAPE in the LRE.
3. The extended school year program (ESY) offered by the Board for the summer 2010 was not appropriate and did not provide the Student with FAPE.
4. The transition plan offered by the Board is appropriate.
5. The functional behavioral analysis is appropriate and able to provide the Student with an appropriate behavior intervention plan.
6. The Board shall be responsible for the payment of the December 2009 evaluation of Dr Powers only, since the Board used that updated diagnosis to continue the Student's eligibility.
7. The Board shall convene a PPT within 2 weeks of the issuance of the Final Decision and order and the PPT shall:

- a. Create a plan to transition the Student from CCCD to the Board's SRP program at the High School.
 - b. The Board shall invite first Dr Molteni, and if he is not available Dr. Powers, to attend the PPT and assist in drafting a transition plan from CCCD to the high school for the Student.
 - c. Once the Student is transitioned to the district's high school, the Student's behaviors need to be evaluated in the new setting.
 - d. The IEP of the Student may contain the lump sum of hours that the Student shall receive in his related services but must also state how many hours of services the Student will receive each week.
 - e. The IEP shall have a BCBA involved in the Student's program for 10 hours each week and continue with a para-professional who has received training in applied behavioral analysis.
8. The Board shall reimburse the parent for their unilateral placement of the Student at CCCD for the summer of 2010 and the 2010-2011 school year. The Board shall continue funding the Student's program at CCCD until the transition to the high school is completed but no longer than 80 school days after the commencement of the transition to the high school.
 9. The Board is not required to purchase the Dynavox M3 as it has not been proven that the Min Mo does not meet the Student's needs.
 10. The Board shall not be responsible for funding the extended day program at CCCD as this was not an issue that was agreed to as an issue for this hearing nor presented by the Hearing Officer at the commencement of the hearing as an issue.
 11. The Student is not entitled to compensatory education for the denial of FAPE for the 2010-2011 school year.