

July 21, 2016

Final Decision and Order 16-0165

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on behalf of the Parents:

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Appearing on behalf of the Board:

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Appearing before:

Attorney Brette Fitton
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the District deny Student a Free Appropriate Public Education (“FAPE”) for that portion of the 2013-2014 school year beginning on September 23, 2013 and running through to the conclusion of the school year?
2. Did the District deny Student a FAPE for the 2014-2015 school year?
3. Was the Individualized Education Program (“IEP”) developed by the District for the 2015-2016 school year appropriate?
4. If the District’s 2015-2016 proposed IEP was not appropriate, does The Spire School, where the Student has been unilaterally placed, provide Student with an appropriate program?
5. Are the Parents entitled to reimbursement for tutoring services provided to Student at Parent expense during the 2014-2015 school year?
6. Are Parents entitled to reimbursement for the private evaluations and consultative services conducted at Parent expense during the 2013-2014 and 2014-2015 school years?

PROCEDURAL HISTORY:

This hearing was requested by Parents on September 23, 2015. The Connecticut State Department of Education appointed the undersigned Hearing Officer on the same date the hearing was requested. During the prehearing conference held on November 10, 2015, hearing dates of January 5, 2016 and January 26, 2016 were set and the deadline for mailing the Final Decision and Order was established as

December 7, 2015. The parties indicated that they were scheduled to engage in mediation on December 1, 2015 and requested an extension of the mailing deadline to allow the parties to engage in mediation and to accommodate the agreed upon hearing date schedule. This request was granted and resulted in a new deadline of January 6, 2016. On December 22, 2015, Attorney for the Student requested an extension of the mailing deadline to accommodate the hearing schedule. This request was granted and the revised deadline was February 5, 2016. On the second day of hearing, January 26, 2016, Attorney for the Student requested another extension of the deadline, in order to accommodate the hearing date schedule. This request was granted and resulted in a new mailing deadline of March 4, 2016. During the hearing, an extension was requested by Attorney for the Parent, and resulted in a deadline of April 1, 2016. On March 21, 2016, Attorney for the Parent requested an extension of the mailing deadline during the hearing and this request was granted on the record and resulted in a deadline of April 29, 2016. On March 31, 2016, Attorney for the Parent requested an extension of the mailing deadline in order to accommodate the upcoming hearing dates. This request was granted and resulted in a mailing deadline of May 27, 2016. On May 18, 2016, Attorney for Parent requested an extension of the mailing deadline of May 27, 2016 to accommodate the hearing date schedule. This request was granted and the new deadline was established as June 24, 2016. On the last hearing date, June 2, 2016, a joint request for an extension of the mailing deadline to accommodate the agreed upon briefing schedule was made and granted, resulting in a deadline of July 22, 2016.

The hearing convened on January 5 and 26, 2016. Additional hearing dates of March 1, 2016, March 8, 2016, March 14, 2016, March 18, 2016, March 21, 2016, March 22, 2016, May 3, 2016, May 6, 2016, May 9, 2016, May 10, 2016, May 18, 2016, and June 2, 2016 were added. A hearing date scheduled for May 17th was cancelled due to health reasons of a party.

The Parent's witnesses were the Mother; Dr. Timothy Heitzman, neuropsychologist, Kathleen Casparino (Parent Advocate); Dr. Laura Seese, psychologist, (Educational Consultant) and Chelsea Horblitt (Spire School Life Coach). The Board's witnesses were Steven DeAngelo, FPS Dean of Students (Dean); Dena Wald, FPS occupational therapist (Occupational Therapist); Erin Wojdaszka, eighth grade special education case manager (Eighth Grade Case Manager); Adrianna Zambrzycka, FPS Contract BCBA (BCBA); Stephanie Devito, FPS seventh grade special education case manager (Seventh Grade Case Manager); Amanda Gaffney, seventh grade long term substitute case manager (Seventh Grade Substitute Case Manager); Caroline Campbell, FPS middle school language arts specialist (Language Arts Specialist); Nicole Rizzo (District High School Special Education Coordinator) and Gerard Barone, Effective School Solutions representative (ESS Representative).

The Parent submitted exhibits numbered P-1 to P-109. P-71 to P-74 were excluded. The remaining Parent exhibits were entered as full exhibits. The Board submitted exhibits numbered B-1 to B-188 which were entered as full exhibits. Parents' request for a special education due process hearing was entered as a Hearing Officer's exhibit HO-1.

All motions and objections not previously ruled upon, if any, are hereby overruled.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

SUMMARY:

The Student, who was born on December 29, 2001, is eligible for special education under the category of Other Health Impairment - ADHD. Student has executive functioning deficits, which negatively impact her organization and writing output. Student also suffers from anxiety which exacerbates her executive functioning deficits. While the District provided an appropriate program for her seventh and eighth grade year, the proposed program for the transition to high school did not contain sufficient therapeutic services to support Student, who struggled with transitions within the school day, in her transition to high school.

STATEMENT OF JURISDICTION:

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

FINDINGS OF FACT:

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following facts:

Background, 504 Accommodations and Identification under IDEA

1. Student was born on December 29, 2001, which was a little over two months before her scheduled due date and as a result of her premature birth, Student spent 29 days in the neonatal intensive care unit. (Testimony of Mother) Student's disabilities have been attributed at least in some part to Student's premature birth and apnea during her perinatal period. (B-4,B-88)
2. Student's parents divorced when Student was 4 years old and Student resides primarily with Mother and alternates spending 4 day weekends with Father. (Testimony of Mother; B-88)
3. While in Kindergarten, Student was diagnosed with Attention Deficit Hyperactivity Disorder - Predominantly Inattentive Type by Dr. Christine McCarthy, a neuropsychologist. (B-4) In her May 2007 report, Dr. McCarthy also identified student as having a Superior Full Scale IQ, having scored in the 95th percentile on the Wechsler Preschool and Primary Scale of Intelligence (WPPSI-III). (Id.) Dr. McCarthy recommended individual tutoring over the summer and consultation with a child psychiatrist, with the goals of teaching student strategies for managing and expressing anxieties, to determine whether medical treatment was warranted, and to monitor medical treatment if Parents

elected to pursue this. (Id.)

4. Subsequent testing by Dr. McCarthy a few months later revealed significant improvements in attentional focus with anxiety noted to be the primary concern due to emotional distress observed when Student was asked to write her name and the alphabet. (B-7) Follow up in first grade showed Student remained in the at-risk category. (B-9)

5. During second grade Student was given accommodations under Section 504 of the Americans with Disabilities Act. Student's 504 accommodations were modified as necessary over the years leading up to Student's identification. (B-31, B-38, B-43, B-61)

6. At a PPT meeting held on June 1, 2012, Student was found eligible for special education and related services under the category of Other Health Impairment-Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder ("OHI-ADD/ADHD"). (B-69)

Student's Medical Needs

7. Student was diagnosed with severe scoliosis when she was 5 years old. (Testimony of Mother; B-30) Initially Student's treatment involved wearing a back brace from age 5 to age 10. (Testimony of Mother) At age 10, it was determined that Student required surgical intervention and during the summer between Student's fifth and sixth grade year, Student had spinal fusion surgery. (Id.) Despite undergoing this surgery in the July following her fifth grade year, Student was able to begin sixth grade at the Roger Ludlowe Middle School in Fairfield at the same time as the other students. (Id.)

8. From the time of the surgery to the present, Student's surgeon has set specific physical limitations which protect her spine. (Testimony of Mother) Specifically, she cannot carry weight over an amount specified by the doctor and is prohibited from wearing a backpack, and so Student was permitted to use a wheeled backpack. (Testimony of Mother; B-92) This backpack did not fit into the middle school lockers. (Id.) District staff had ongoing communications with Mother regarding Student's limitations as they pertained to activities Student might be asked to participate in and Student's needs were accommodated. (B-93, B-96, B-105, B-113, B-115 and B-117) Although the educational consultant hired by Parents stated the District was unable to meet Student's physical needs because the school was physically too large, no documentation from a doctor was provided to support this claim. (Testimony of Educational Consultant, p. 94)

9. Parents arranged for Student to receive treatment with medication for her attentional issues and made adjustments to medication over time. (B-40, B-66, B-88) Medication was subsequently discontinued by Parents and was not being utilized by the time period that is the subject of this hearing. (Testimony of Mother; B-88)

Evaluations

10. At the request of Parents, the PPT met on March 5, 2012, Student's fifth grade year, and agreed to have Dr. Timothy Heitzman conduct a neuropsychological evaluation, which was paid for by the District. (B-73, B-78, B-82) An occupational therapy motor screening and consult with a teacher of the visually impaired were also recommended and completed. (B-78, B-83, B-85)

11. Dr. Heitzman confirmed Student's previous diagnosis of ADHD-Predominately Inattentive Type, and noted behaviors that met the criteria for Obsessive Compulsive Disorder ("OCD") but which he identified could be, along with Student's recent decline in functioning, attributed to Student's medication. (B-88, p. 8) Student's executive dysfunction is specifically linked with Student's limited ability to regulate focus and inhibit distractions, which manifests itself in difficulty shifting attention in a fluid manner. (B-88, p. 8) Student's anxiety exacerbates her executive functioning dysfunction. (Id.) Student's full scale IQ could not be determined by Dr. Heitzman due to discrepancies between the score on the processing speed composite amid the other three composite scores on verbal comprehension, perceptual reasoning, and working memory. (B-88, p. 12) Student has well below average processing speed and low average working memory. (Testimony of Dr. Heitzman, p. 103; B-88 p.5)
12. In 2012, Student's academic achievement fell in the average range for reading and within the average to high average for math, while Student's spelling was at the low end of the average range, her handwriting was characterized by poor spatial orientation and her writing showed little verbal organization in her written expression. (B-88)
13. Student's writing difficulties flow from her executive functioning deficits and anxiety, which exacerbate each other, as opposed to one causing the other (Testimony of Dr. Heitzman, p. 116, Testimony of Language Arts Specialist; B-88)
14. Dr. Heitzman's evaluation contained a list of recommendations, of which some but not all were implemented by the District. (B-88)
15. Student while not oppositional as that is clinically defined, is challenging when you are trying to really push her to test limits and push her to try new things. (Testimony of Dr. Heitzman, p. 21) Student does not perceive herself as having a disability, is very resistant to recognizing her special needs and struggles with identifying herself as a student with special needs. (Testimony of Dr. Heitzman p. 165; B-131, p.2.) Student and Dr. Heitzman worked on analyzing situations and other possible perceptions of events that troubled Student, but this was challenging for Student. (Testimony of Dr. Heitzman, pp. 188-189) Student has a hard time perceiving the views of things that were different from her own. (Testimony of Dr. Heitzman p. 188)
16. Student also has difficulty dealing with the thoughts and perspectives of other students in small group discussions and activities. (P-8, p.2) When other students are not in line with what she wants to do or how to handle the task she gets distressed. (Id.)
17. On February 21, 2014, an ecological assessment was conducted by the BCBA, which confirmed that Student's learning environment impacts her on-task environment and as such, highly structured predictable and quiet settings are recommended. (B-124, p.12) Recommendations in the assessment included placement in structured settings, preferential seating, use of assistive technology, an additional set of textbooks in the classroom, setting specific routines around organization of material at the beginning of class, a self-monitoring system to teach Student to discriminate between her on-task and off-task behavior in order to increase on task time, and functional communication training, which was to be reinforced with a differential reinforcement system.
18. Student's Educationally Based Occupational Therapy triennial evaluation was completed in May 28, 2014 and contained the results of the Test of Visual-Perceptual Skills 3rd edition (TVPS-3) on which Student had an overall score in the 87th percentile. (B-132, p.5) Student scored in the 77th

percentile in the Beery Buktenica Developmental Test of Visual Motor Integration (VMI). (B-132 p. 6) Student's performance in the area of fine manual control on the Bruininks-Oseretsky Test of Motor Proficiency 2 was in the 73rd percentile. (B-132, p. 7) Student's performance on the Test of Handwriting Skills -Revised (THS) was in the 99th percentile for accuracy, however the speed at which Student writes letters varied between the 16th and the 50th percentile. (B-132, p. 6)

19. A Language Arts evaluation was conducted as part of Student's 2014 triennial evaluation. (B-128) Student scored in the average to well above average in the Woodcock Reading Mastery Test-III and in the average to above average in in all areas of the Test of Written Language with the exception of the vocabulary subtest of the contrived writing section on which she scored below average. Student's spontaneous writing score was in the 39th percentile, which when combined with the contrived writing score in the 68th percentile contributed to the overall writing score falling in the 61st percentile. (B-128, p.6)

20. Student was evaluated in math as part of her triennial evaluation by the substitute case manager for seventh grade. (B-177) Student placed in the above average range overall. (Id.)

21. An Assistive Technology Consultation Report was issued by a member of the Assistive Technology Team on April 24, 2014. The AT team member recommended a specific application that would support Student's IEP goals. (Id.) The application recommended was available on all school computers. (B-188, pp. 409-410.) Beginning slowly with only one or two functions of the application at first was recommended, as was the issuing of an iPad to Student for the 2014-2015 school year. (Id.)

22. The Diagnostic Study completed in May of 2014 by the school psychologist, who did not testify at the hearing, indicated that Student has a low processing speed and although her academic fluency is in the average range her fluency with simple math problems was within the low average range. (B-131, p. 5.) Student's reading and writing fluencies are within the average range. (Id.) Student's ability to sustain efficiency in tasks of little interest is negatively affected. (Id.) Diagnosis of ADHD was confirmed through administration of the Connors 3 test. (Id.) Results on the BRIEF confirmed Dr. Heitzman's analysis that shifting tasks is a challenge. (B-131, p. 6) The school psychologist recommended clear instructions broken down into steps, access to checklists for multistep tasks, verbal cuing, estimating time needed to complete a task and assessment of accuracy of estimate afterwards, models for self-monitoring, allowing self-direction in choosing areas of academic interest, use of graphic organizers when writing, modification of homework and additional time on tests and written assignments, clear organized presentation of information. (B-131, p. 6)

Student's Academic Achievement during Middle School and Standardized Testing

23. During Student's sixth grade year, Student received grades ranging from a B to an A- in Student's core academic classes, with the exception of Spanish, in which she received a P for Pass/Fail. (B-172) Student received grades of A- to A+ in her six Unified Arts/Elective courses. (B-172) Student took the Connecticut Mastery Test in 6th grade and placed at the advanced level for mathematics and reading and at the goal level for writing. (B-99)

24. During Student's 7th grade year, Student received grades ranging from B to A- in her core academic classes, with the exception of Spanish, in which Student received a letter grade of C. (B-172) Student received grades ranging from a B to A+ in her Unified Arts/Elective courses. (Id.)
25. In eighth grade, with the exception of Spanish in which Student received a letter grade of C, Student received grades ranging from B to A- in her core academic classes. Student received grades ranging from a B+ to A in her Unified Arts/Elective courses. (B-172)
26. Smarter Balanced Summative Assessment ("SBAC") results from testing administered in the spring of 2015 placed Student at a Level 4 out of 4 Levels in the subject area of English, Language Arts and Literacy, demonstrating that Student had exceeded the achievement level expected for eighth grade students. (B-173) Student's SBAC Math results placed her at a Level 3, which indicated Student has met the achievement level for Mathematics expected for this grade. (Id.)
27. Student's ability to achieve grades reflective of her academic ability was not a concern expressed by teachers. (P-8, p.1)

Seventh and Eighth Grade IEPs and Implementation

28. From 2008, through the date of the filing of the hearing request, Parents have responded quickly to what they believed were inaccuracies and omissions in documents produced as a result of PPT meetings with comments and requests for correction. (B-13, B-23, B-28)
29. During Student's seventh and eighth grade years, PPT meetings were held on September 11, 2013, October 23, 2013, March 12, 2014, May 29, 2014, October 27, 2014, September 10, 2014, December 23, 2014, April 21, 2015 and September 11, 2015. (B-116, B-121, B-127, B-133, B-138B, B-140, B-136, B-145, B-151.)
30. Student's Present Levels of Academic Achievement and Functional Performance ("PLAAFP") in June of 2013 and for successive IEPs were noted to be age appropriate in all areas except the academic/cognitive area of language arts, fine and gross motor skills, and other/academic/nonacademic areas, where Student's executive functioning deficits were noted. (B-197, p. 5) (B-126, B-126A, B-133) Student's PLAAFP were modified in the October 27, 2014 IEP to include concerns about behavioral and social and emotional concerns being age inappropriate. (B-138, p.5) These concerns are duplicative of those previously listed under other/academic/nonacademic areas.
31. Student's IEP for the 2013-2014 school year, Student's seventh grade year, contained the following special education services: 2.10 hours of writing instruction weekly in the general education setting, 1.67 hours of weekly small group/individual learning strategies instruction, and .7 hours a week of small group/individual academic support (B-108, p. 19) Occupational therapy occurring .7 hours a week was included as a related service. (Id.)
32. No disagreements with the goals and objectives that were developed at the June 2013 PPT to address the areas of writing, executive functioning, and fine motor skills were noted in the IEP summary. (B-107, p. 2 and pp. 8-14)
33. Dr. Heitzman was impressed by the amount of data collection done by the school staff when he met with them in November of 2013. (P-8, pp. 1-2)

34. Classroom teachers completed checklists of Student's performance on a weekly basis and these were sent to parents every two to three weeks. (B-177, p. 146)
35. A PPT meeting was held on September 11, 2013, during which Parents, through the Parent Advocate, requested clarification of how the data and progress monitoring would align with the goals of the IEP. (B-116, p. 2) As a result of this discussion Goal 1 was modified so that objective one set forth a system in which writing prompts were to be scored three times, first draft, second draft and then completed with technology. (B-116, p. 7). Although the summary indicated that the three step scoring process would be specified in Goal 2 and would involve a social studies focus, the changes were applied to objective 2 under goal 1. (B-116)
36. Around Thanksgiving 2013, Dr. Heitzman met with members of Student's school team and reported his impressions to Parents in an email on December 3, 2014. (P-8, p.1) Dr. Heitzman acknowledged in this email that the team seemed to have done a LOT of work behind the scenes to identify target issues. (Id.) Dr. Heitzman identified two general themes based on data and teacher reports: transitions and flexibility of Student's perspective in class. (Testimony of Dr. Heitzman p. 33; P-8, p.1.)
37. Although Student did not master her IEP goals and objectives, she made satisfactory progress on them and, as evidenced by her grades, was able to make progress in the general educational curriculum. Student's progress on her 2013-2014 occupational therapy goal and objectives was included at the end of Student's triennial evaluation. (B-132, pp. 7-9) The occupational therapist reported that Student demonstrated partial mastery of Objective 1, mastery of Objective 2, partial mastery of Objective 3 and satisfactory in Objective 4. (Id.)
38. Progress reports on Student's goals and objectives for the 2013-2014 school year were produced on November 2013 and February, April and May 28, 2014. (B-121, B-122C, B-129A, 132A)
39. Progress reports on Student's goals and objectives for the 2014-2015 school year were produced on November 2014 and February, April and June 2015. (B-139, B-143, B-147)
40. Whether or not all of the Progress reports were sent home is disputed by Parents and the District. (Testimony of Mother and Substitute Case Manager). It was not until Parent assembled her records to give to the educational consultant, that she found she was missing the April 2014 and June 2014 summaries. (Testimony of Mother)
41. Writing objectives that were present in Student's IEP in March of 2014 were not present on Student's IEP on May 29, 2014. (B-126, B-133) Parents were emailed a draft of the IEP with the discrete writing goal removed on May 28, 2014 by the seventh grade Substitute case manager. (B-177, p.440-445) At Mother's request, a PPT meeting was held in October 2014 and writing goals and objectives were added to the IEP. (Testimony of Mother; B-138B) The PPT summary states that the PPT had decided to add a writing goal that was inadvertently omitted. (B-138, p. 2)
42. Student had four case managers over the space of two years due to maternity leaves. B-179, p. 12) This was due to two maternity leaves. Transitions between providers were planned and involved providers overlapping and working together before the actual transition to the substitute. (Testimony of Eighth Grade Case Manager)
43. The BCBA consulted with District Staff during the 2014-2015 school year on data collection and data analysis. (B-155)

44. Weekly summaries of Student's performance in her classes were sent by email to the Parents by her case managers. (B-177, p. 27 and p. 293) A chart of baseline data on writing focus areas per the request of the Parent Advocate was generated on June 24, 2013. (B-111) There were regular team meetings with staff and Parents outside of the PPT meetings that were held.

45. In keeping with the recommendations of the school psychologist in his triennial evaluation, several checklists were utilized with Student. (Testimony of Seventh Grade Case Manager, p.34 and p. 56) Data was collected and analyzed under the supervision of the District BCBA. (Testimony of BCBA, p. 27, Testimony of Seventh Grade Case Manager; P-53) Although Student felt the simple nature of the checklists made them babyish and that she didn't need behavior plans, Dr. Heitzman saw value in Student starting small. (Testimony of Dr. Heitzman, p. 63) Student has a hard time starting off with small steps. (Id.)

46. Requests for the data on which progress was being measured were not met in some instances or there was a significant delay in receipt of the documentation. Writing samples were not provided until the return of the eighth grade case manager from maternity leave. (Testimony of Eighth Grade Case Manager, p. 176) Data was produced at the hearing by the eighth grade case manager, which had not been provided previously to Parents. (Testimony of Eighth Grade Case Manager, p. 204)

47. Dr. Heitzman participated in the PPT in which counseling services were identified for the upcoming 2013-2014 school year. (Testimony of Dr. Heitzman, p. 30)

School Response to Parent Requests about Other Students

48. On June 9, 2014, Mother sent an email to Student's guidance counselor, requesting that Student not be in certain classes with a specific student during the 14-15 school year, to which the guidance counselor responded that her request was noted in the Student's records, but that it might not be possible to separate the children in Music and/or PE classes, but that if both students had PE at the same time, the children could be separated. (P-79)

49. On November 4, 2014, Mother met with the principal to discuss her concerns about Student being upset at having been enrolled in a health class section, which according to Student had 5 paraprofessionals and the most atypical kids in her grade. (P-82) As a result of this conversation, Student was moved to a different health section. (P-82)

Tutoring

50. In 2014, Parents hired a tutor from a company called A Way to Learn. (Testimony of Mother) This tutor assisted Student in homework completion and sent reports of her work with Student to Mother regularly. (Testimony of Mother, P-103 p.1-90) Student was tutored through Student's enrollment in the Spire School. (Testimony of Mother) Some of the tutoring session were dedicated to SSAT test preparation for Student's application to private schools. (105 pp.82-83) Tutor's intervention with Student on writing prompts compromised them as assessments for the purposes of this hearing.

Camp Experience and Transition of Dr Heitzman's Role to Counselor

51. In the summer between Student's seventh and eighth grade school years, Parents sent Student to the Explo Program, a private residential program held on the campus of Wellesley College in Massachusetts, which provides enrichment opportunities through coursework in a wide variety of disciplines. (Testimony of Mother) Student's experience was not a good one, due to the incompatibility of the independent nature of the program and Student's executive functioning deficits. Student had conflicts with an international roommate from Asia and didn't feel she advocated for herself in those conflicts. (Testimony of Mother) The program director informed Mother at the end of the program that changes would have to be made before Student would be allowed to attend in the following year. (Id.)

52. Concerned after the camp experience, Mother then contacted Dr. Heitzman and hired him to provide counseling to Student. (Testimony of Mother) Dr. Heitzman began counseling with Student and would alternate the focus in sessions between social and emotional areas and executive functioning. (Testimony of Dr. Heitzman) Dr. Heitzman's role at this time shifts to that of clinician and thus is no longer able to conduct evaluations of the Student. (Testimony of Dr. Heitzman p. 156)

53. Dr. Heitzman's sessions were twice a week but moved to once a week over time. (Testimony of Dr. Heitzman)

54. With regards to Student's perceptions of bullying, Dr. Heitzman did not hear anything during his sessions with Student that was putting Student in any kind of risk or harm or anything else that would require him to step in with the schools and teachers. (Testimony of Dr. Heitzman, p. 77)

Bullying

55. On September 30, 2013, Mother contacted the Spanish teacher after Student reported that Student had forgotten to bring a pen or pencil and told the entire class that one of them should lend her a pen because Student chews on pencils, at which point the class laughed at Student and then later the Student who lent her a pencil threw the pen in the garbage to get another laugh from the other Students. (P-6)

56. In May 2014, an allegation of another student bullying Student in Spanish class was brought to the attention of the Dean. (Testimony of Dean of Students. pp. 115-116) The specific allegation was that the other student told Student she needed to get, or use a tissue. (Id.) The Dean investigated the incident by calling the other student down to his office, where the student admitted that he had made the statement. (Id.) The Dean determined it was a mean-spirited comment, not bullying, and gave the other student a consequence. (Id.)

57. Dean was not aware of the prior incident in 2013 with the Spanish teacher, when the May 2014 incident occurred. That incident had been handled by assistant principal, Mr. Banner, because it involved a teacher. (Testimony of Dean of Students, p.117) The peer who made the comment about Student needing a tissue was one of the students who laughed when the Spanish teacher made the comment about the pencils. (Id.) The District took steps to ensure that this peer and Student were not in the same crew (core) classes going forward. (Testimony of Dean of Students, p.17) While not always possible to separate children who have had negative interactions in the Unified Arts classes,

the District works to separate children in their core crew classes. (Testimony of Dean of Students, p.118) Kelly Cummings, the guidance counselor, assisted in this process.

58. Student had a difficult time with the Spanish teacher due to personality differences. (Testimony of Seventh Grade Substitute Case Manager). Despite these differences, Student was able to make educational progress in Spanish. (Testimony of Seventh Grade Substitute Case Manager; B-177, page 137)

59. Mother sent an email in February 7, 2014 informing the substitute case manager that Student is getting increasingly upset about what was occurring in Spanish class. (B-177, p. 211) The substitute case manager worked with Spanish teacher on strategies to use with Student and spoke with Spanish teacher because she felt that it was a good idea for Spanish teacher and mother to speak directly about issues pertaining to Student, rather than having the substitute case manager act as the middleman. (Testimony of Seventh Grade Substitute Case Manager May 9, 2016, p. 69; B-177, p. 208) The case manager reported that towards the end of the school year Student's relationship with the Spanish teacher and Student's enthusiasm towards Spanish increased. (Testimony of Seventh Grade Substitute Case Manager May 9, 2016, p. 70-71; B-177, p. 229)

60. In June of 2014, a staff member brought an incident to the Dean's attention in which a peer had made a comment to Student in Art class regarding Student arriving late to class and said good bye to Student at the end of class, and Student was upset by these comments. (Testimony of Dean of Students) The Dean investigated the incident by interviewing 12-13 students. (Id.) The peer admitted to having these interactions with Student and was disciplined. (Id.) As a proactive measure, the peer's locker was changed to a different location, since it was located near Student's. (Id.)

61. In October 2014, a concern was brought to Dean's attention that Student had expressed that she felt peer was making fun of her in art class and was taking the clay coils she had made and glaring at her. (Testimony of the Dean of Students) The Dean investigated this by speaking to the teacher and the peer. (Id.) The Peer denied interactions reported by Student and the art teacher did not confirm Student's perceptions of those interactions. (Id.) No disciplinary action was taken in response to Student's allegations. (Id.) During a conversation with Student about the peer from art class, Student informed Dean about an incident involving that same peer in which she thought that the peer was taking pictures of her wearing a costume while volunteering at an off-campus event called the Enchanted Castle. (Testimony of the Dean of Students) The Dean interviewed the peer, who reported that he had asked Student if he could take her picture and she had declined. (Testimony of the Dean of Students) The Dean then went through peer's phone and did not see any pictures of Student. (Id.) Dean warned the peer that there would be negative consequences if pictures of peer at this event were surfaced and disseminated. (Id.). No evidence was presented at the hearing that photographs were taken of Student or that photographs of Student were posted or distributed physically or electronically. (Id.)

62. On May 6, 2015, Mother sent an email to the principal, on which the Dean of Students and several other staff members were copied, in which she stated Student was reporting multiple students kicking her rolling backpack after she passes by, that this had been happening every morning since before Christmas, and asking to speak with the Dean of Students; arrangements were made for a phone conference that day. (P-85, p 2; B-179, p. 753)

63. In response to Mother's concerns, the Dean of Students interviewed Student in the presence of other staff members (Testimony of the Dean of Students) During the interview, Student stated the kicking occurred in the mornings and that she was unsure who was doing the kicking and declined the Dean's offer to go through the yearbook to try to identify Students. (P-133)

64. The day after the Dean met with Student, Mother sent an email expressing concern that Student was intimidated by the number of adults in the room and that Mother was unclear as to whether Student had told the Dean everything that was bothering her. (P-85) In response to Mother's concern, the Dean had a follow-up conference with Student. (Testimony of Dean of Students) The Student was unable to given any more information about who she thought might be kicking her backpack. (P. 134) The Dean spoke with Student and suggested that the next time Student felt someone was kicking her backpack she should stop and see who it might have been. (Testimony of Dean of Students)

65. The Dean then reviewed video recordings of the eighth grade hallway during arrival time on seven to eight days and did not observe any time in which Student's backpack was kicked. (P-133) Access to video was limited by the fact the school only maintains 30 days of video. (Id.) The Dean spoke with classmates whose lockers were near Student's locker and these classmates did report that other students were deliberately kicking Student's backpack. (P. 136)

66. Mother stated that Student continued to report that kicking of Student's backpack continued after Dean reviewed the videotapes. (Testimony of Mother) No evidence was offered at the hearing to show that Mother or Student reported that the kicking continued to occur.

67. Mother and the Dean also spoke on the phone regarding concerns Mother had about an overnight field trip to Philadelphia that Student had taken with her classmates and on which Mother served as a chaperone. (Testimony of Dean of Students) During this trip, Mother expressed that a group of students pushed past Student and her friends in a rush to get to the buffet. (Id.) The Dean, who was on the trip and ate last, did not witness the incident that Mother described. (Id.) Neither Student nor Mother reported this incident to the Dean or raised any other concerns during the field trip. (Id.)

2015-2016 IEP and Unilateral Placement

68. On April 2, 2015, Dr. Heitzman sent an email to Student's guidance counselor and the school psychologist, in an effort to get out in front of anticipated disputes at the upcoming April 21, 2015 PPT meeting. (P-90) In this email, he included questions about Student's proposed program for the upcoming year and shared inputs about the Student's needs. (Id.)

69. Dr. Heitzman indicated in his email his "...belief that placement with an equivalent social peer-group needs to take priority over learning-needs peer group." (P-90) Dr. Heitzman's position was based on his belief that if Student's social needs were met by not placing her in environments with students with observable disabilities, then more of her attentional resources would shift to her education. (Id.)

70. In the same email in which Dr. Heitzman stated that Student should not be grouped according to her academic needs, he requested a description of the collaborative classroom setting, because the Parents were "...imagining a larger classroom with the same proportion of children with significant

developmental needs i.e. Autism and Down Syndrome, etc. rather than “garden variety” LD or ADHD and more typical peers.” (P-90) Dr. Heitzman also passed along the concerns that Parents had about academic rigor based on rumors they had heard about collaborative classes. (Id.)

71. Mother had previously expressed to Student’s tutor that Student had been grouped with a student with Down syndrome and a severely autistic student at school which in Student’s mind contributes to classmates thinking that she is “stupid”. (P-82)

72. On April 24, 2015, Mother requested that Dr. Heitzman have the opportunity to observe multiple freshman collaborative classes. (Testimony of Mother; P-91, p.2) In response, the high school housemaster indicated that collaborative team members would be made available for a meeting with Dr. Heitzman, but that he would not be able to observe current classes. (P-91, p. 1.) When Mother asked why that was, the Director of Special Education responded that it would be disruptive to the educational process for him to observe multiple classes at the high school and again offered to make collaborative staff available for a meeting. (Id.) The District also indicated Dr. Heitzman would be allowed to observe Student in her placement. (Id.)

73. The main purpose of Dr. Heitzman’s observation of collaborative classrooms was not to vet the academic level of the curriculum, but to see whether there were students whose disabilities were readily apparent and obvious, either because of facial characteristics or behavior. (Testimony of Dr. Heitzman, p. 197) Dr. Heitzman believed this was important due to his theory that Student was too distracted by her academic placement and being with children with more obvious disabilities to have the ability to succeed as a Student. (Testimony of Dr. Heitzman, p. 83)

74. At the hearing Mother testified that she believed that in addition to observing the kinds of disabilities other students had, Dr. Heitzman would be able to judge the “speed” of the class and notice if there were interruptions due to noise. (Testimony of Mother, March 21, 2016, p. 61)

75. In addition to the opportunity given to Dr. Heitzman to speak with teachers in the high school, a member of the high school staff was present at the PPT meeting for ninth grade, who described the collaborative classes. (Testimony of Mother, March 21, 2016)

76. In the months leading up to the PPT meeting which would address Student’s IEP for the ninth grade year, Parents and Student explored the option of attending the Bridgeport Regional Aquaculture Science & Technology Education Center (“Aquaculture program”), an off-site program in which Student would spend the morning and then transition to Fairfield Warde High School for the second half of the school day. (Testimony of Mother) In the winter of 2015, Student applied for and was accepted into the Aquaculture Program and Mother signed a form confirming Student would be attending this program on February 4, 2015. (B-140A)

77. At Student’s annual review PPT meeting held on April 21, 2015, Student’s Individualized Education Program for the 2015-2016 school year was discussed by the PPT, which included a representative from the Aquaculture program, and the IEP developed was based on the belief that Student would be attending Aquaculture program. (B-145, p.1)

78. The April 2015 IEP for the 2015-2016 school year included placement in collaborative classes for English, Global Studies and Math and Learning Center Support of 2 hours and 45 minutes every 4 day cycle. (B-145, p. 2) Related services recommended included occupational therapy of 30 minutes per week, an occupational therapy consultation once per month and counseling at a frequency of 30 minutes every 2 weeks. (B-145, p. 25) The proposed IEP indicates that due to

increased Learning Center time from once to twice a week, Student would miss gym once a week and would also miss classroom instruction when participating in occupational therapy. (B-145, p. 26)

79. There was an open house at the Aquaculture program at which Student saw children whom she believed had bullied her in the middle school and Student subsequently lost interest in attending the program in June. (Testimony of Mother) Parents did not notify the District that Student was no longer interested in attending the Aquaculture program. (Testimony of Mother)

80. After the April 2015 PPT meeting, Parents decided Student's placement in collaborative classes was unacceptable and began to look into alternative programs. (Testimony of Mother) Parents hired Dr. Laura Seese, psychologist, as an educational consultant in June of 2015. (Testimony of Educational Consultant; B-149) Dr. Seese reviewed the educational records provided to her by Mother, spoke with Mother and the Parent Advocate and interviewed Student in the second week of June. (Id.) Despite being retained prior to the end of the school year, the educational consultant did not speak to anyone from the Fairfield Public Schools, at either the middle school or high school level. (Testimony of Educational Consultant; B-149)

81. On August 22, 2015, the educational consultant drafted a letter to Parents which contained a review of the records provided to her and a recommendation that Student be placed at the Spire School. (B-149) No other placement was recommended by the educational consultant, and the other placements that were reviewed and rejected by the educational consultant as not qualifying as an appropriate placement in the least restrictive environment were not identified in the letter (Id.) On August 23, 2015 or August 25, 2015 (it is difficult to tell from the handwriting whether it is a 3 or a 5, Father executed the contract for the Spire School. (P-42) Mother executed it on August 25, 2015. (P-42)

82. On September 11, 2015, a PPT meeting was held to review the letter written by the educational consultant and to address the issue of Parent's notice of unilateral placement. (Testimony of High School Special Education Coordinator) The school based PPT members were teachers and other staff members from the high school. (Testimony of High School Special Education Coordinator)

83. The PPT made changes to the April 2015 IEP by condensing Goal One Objectives 3, 4 and 5 into Objective 3, in order to address the inability to collect baseline data as set forth in the previous IEP objectives, since the Student had already been outplaced and started the year somewhere else. (Testimony of High School Special Education Coordinator; B-151) Changes were also made to address a concern about referencing a middle school rubric in an IEP for a rising ninth grader. (Testimony of High School Special Education Coordinator; B-151)

84. The PPT, as a result of learning that Student would not be attending the Aquaculture Program, added a collaboratively taught Science program to the September 11, 2015 IEP. (Testimony of High School Special Education Coordinator; B-151)

85. After considering the letter from the educational consultant regarding concerns that Student needed clinical therapeutic support, the PPT proposed that Student be evaluated for Effective School Solutions "ESS". (Testimony of High School Special Education Coordinator; B-151) ESS entered into a contract with the Fairfield Public Schools in June of 2015. (P-97)

86. Effective School Solutions offers group and individual therapy and psychoeducation in the form of a learning strategies class taught by a clinician and a special education teacher. (Testimony of

ESS Representative, p. 19, Testimony of High School Special Education Coordinator) The learning strategies class would take the place of two of the three electives Student would be able to take if she were not participating in ESS. (Testimony of High School Special Education Coordinator) ESS also offers family therapy and parent support groups. (Testimony of ESS representative, p. 19)

87. After the PPT recommended Student be evaluated by ESS on September 11, 2015, Parents did not sign consent for Effective School Solutions to do so. (Testimony of High School Special Education Coordinator, p.47) During the intake evaluation, a diagnosis is developed and a treatment plan for that diagnosis is created with objectives for treatment. (Testimony of EES Representative, p. 21) The evaluation process includes completion of a 20 page evaluation form and a meeting with Parents and Student which lasts from one and a half to two hours. (Testimony of EES Representative, p. 25.)

88. Students in ESS currently have mental health issues such as major depressive disorder, anxiety disorder, bipolar disorder and post-traumatic stress disorder. (Testimony of ESS Representative) Students in ESS would normally have ADHD and/or executive functioning disorders as secondary, rather than primary diagnoses. (Testimony of ESS representative) ESS provides a higher level of intervention to be accessed when lesser interventions have failed. (Testimony of ESS representative)

89. If Student was not accepted into ESS, then Student would receive 30 minutes of counseling every two weeks set forth under the existing IEP, however EES would refer them to the level of care their evaluation indicated Student needed. (Testimony of High School Special Education Coordinator, Testimony of EES Representative, p. 28; B-151) Participation in ESS would have precluded Student from participating in the Aquaculture program, but the educational consultant had already determined participation in aquaculture (Testimony of Educational Consultant p. 125)

90. The District's high school organizes groups of students into houses. (Testimony of High School Special Education Coordinator) In response to concern about Student's physical limitations, Student was moved from her original placement in a house in the high school which had an office on the second floor to a house with an office on the first floor. (Testimony of High School Special Education Coordinator)

91. The curriculum taught in the collaborative classrooms is the standard ninth grade curriculum, and which is tested through common grade-wide assessments. (Testimony of High School Special Education Coordinator)

92. Parents requested placement at The Spire School at the September 11, 2015 PPT meeting, citing concern about Student sticking out as a special education student under the IEP proposed by the District; the District refused this request. (Testimony of High School Special Education Coordinator)

93. The Spire School has been approved as a state approved private special education school. (Testimony of Spire Life Coach, p. 97)

94. Students at Spire have mild to moderate learning disabilities and some sort of social or emotional needs such as anxiety, depression or a mood disorder and are on or at grade level. (Testimony of Spire Life Coach, March 21, 2016, p. 100) Spire's staff includes a clinical psychologist, a licensed professional counselor, a social worker and two school counselors, any of whom Student can access. (Testimony of Spire Life Coach, March 21, 2016, p. 97 and p.100) There are 15 certified teachers and 4 special education teachers. (Testimony of Spire Life Coach, March 21, 2016, p.101)

Occupational therapy is provided at the school. (Testimony of Spire Life Coach, March 21, 2016, p. 101. P-41)

95. Since the beginning of the 2015-2016, Student's schedule at Spire has been modified. Music has been replaced by a learning lab (study hall) and an additional executive functioning class was added. (Testimony of Spire Life Coach, March 21, 2016, p. 104)

96. Student's schedule includes an Executive Function Group of 4 students and two executive function coaching sessions in a one to one setting. (Testimony of Spire Life Coach, March 21, 2016, p. 105) Student also has access to therapeutic staff throughout the day, in addition to scheduled therapy sessions. (Testimony of Spire Life Coach)

97. Student's anxiety has subsided since her arrival at Spire. Her anxiety had manifested itself in Student eating tissues. (Testimony of Spire Life Coach, March 21, 2016, p. 116)

98. At the time of initial enrollment at Spire at the beginning of Student's ninth grade year, teachers were completing Student's homework and scribing it for her. (Testimony of Spire Life Coach, March 21, 2016, p. 118) Student has since been transitioned to doing it herself which staff understands would result in missing assignments. (Testimony of Spire Life Coach, March 21, 2016, p.119) Student has friends at Spire. (Testimony of Spire Life Coach, March 21, 2016, p. 123)

100. Student is permitted a three minute buffer between classes ((Testimony of Spire Life Coach, March 21, 2016, p. 131) Student continues to require prompting and a lot of redirection. (Testimony of Spire Life Coach, March 21, 2016, p.138)

101. Student's grades for the first quarter of Spire in 2015-2016 ranged from B- to A. (P-53)

CONCLUSIONS OF LAW AND DISCUSSION:

1. The standard for review of special education programs for individual students with disabilities was established by the U.S. Supreme Court in the case of *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). *Rowley* established two tests: 1) were the procedural requirements of the Act complied with; and 2) was the educational program developed for the child reasonably expected to provide educational benefit.
2. The design of the IEP for Student's 2013-2014 was appropriate under the second prong of *Rowley*. The goals and objectives were reasonably calculated for Student to make progress in the areas of concern noted on Student's PLAAFP. (Findings of Fact No. 23-25) Parents, with assistance from Parent Advocate, advocated for and obtained changes to the IEP and these were implemented, demonstrating they had a meaningful opportunity to participate in the process. (Finding of Fact No. 28) With consultation from Dr. Heitzman, staff were assisted in better understanding Student. (Finding of Fact No. 36) Although Student did not master her goals and objectives, she made satisfactory progress on them and, as evidenced by her grades and test scores, was able to make progress in general educational curriculum. (Findings of Fact No., 24, 25, 26, 37) To the extent there were claims of inconsistency of staff, these claims were found to be without merit as the District was aware of the transitions in advance and planned appropriately for them. (Finding of Fact No. 42)

3. The proposed IEP for the 2015-2016 school year was not appropriate under the second prong of *Rowley* because the therapeutic services offered were not sufficient for Student who was transitioning to high school and who suffers from significant anxiety which exacerbates her executive functioning issues. While the goals and objectives were reasonably calculated for Student to make progress in the areas of concern noted on Student's PLAAFP, and Student's grades indicate that she was able to make progress in the general education curriculum during the year, the inclusion of 30 minutes of counseling every two week was not sufficient, even if Student was not going to attend the Aquaculture Program, with its multiple daily transitions which were inappropriate for the Student.
4. The District did not deny Student a FAPE in the 2013-2014 and 2014-2015 school year when writing goals were removed from Student's IEP on May 29, 2014 and writing goals were not added until October 27, 2014. (Finding of Fact No. 41) Parents had a copy of the draft IEP without the writing goal before the PPT meeting. (Finding of Fact No. 41) Being in possession of this draft invalidates claims that the writing goals were unilaterally removed without notice to the parents. The record supports a finding that the District statement that the goals were inadvertently dropped in the October 2014 IEP was inaccurate. The District, at the time the IEP was drafted, had a Language Arts evaluation which indicated Student was performing at an average level. (Finding of Fact No. 19) Changes to the goals and objectives were noted in the IEP summary. While Parents did not have access to all of the data underlying the progress reports generated by staff that they requested, enormous amounts of information was provided to them over Student's seventh grade years in the form of weekly emails from case managers, weekly checklists completed by classroom teachers, and progress reports. (Findings of Fact, No. 34, 42, and 44) There was insufficient evidence to support Mother's allegation that the progress reports were not generated and sent.
5. Student was not denied a FAPE as a result of bullying during her seventh and eighth grade years. A District's failure to address bullying can result in a finding of a substantive violation of the Student's right to a FAPE. *T.K. v. New York City Dep't of Educ.*, 779 F.Supp. 2d 289 (E.D.N.Y. Apr. 28, 2011) The District Court in this case set forth a four-part test to determine whether significant, unremedied bullying could constitute a denial of FAPE. (Id.) To determine whether a substantive denial of a FAPE has occurred, the fact-finder must apply the following analysis: (1) Was Student a victim of bullying; (2) Did the school have notice of the substantial bullying of the student; (3) Was the school "deliberately indifferent" to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) Did the bullying "substantially restrict" the student's educational opportunities? (Id.)¹ A failure to address bullying can also result in a finding of a procedural violation of Student's right to a FAPE. *T.K. v. New York City* 810 F.3d. 869, 67 IDELR 1 (United States Court of Appeals, 2nd Circuit (2016)) Before any analysis of a denial of FAPE as a result of bullying can be undertaken, bullying must be defined. Although bullying is not defined under the IDEA, or

¹ The second circuit declined to put its imprimatur on the four-part test promulgated in the District Court's ruling. *T.K. v. New York City* 810 F.3d. 869, 67 IDELR 1 (United States Court of Appeals, 2nd Circuit (2016))

elsewhere in federal law, the U.S. Department of Education and the Office of Special Education Programs (“OSEP”) and the Connecticut legislature have provided definitions. OSEP has defined bullying as follows: Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone’s reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g. cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social media networking sites, or fake online profiles. Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Office of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013)) In Connecticut the legislature has passed an anti-bullying law in which, bullying is defined as:

(A) the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district, or (B) a physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that: (i) causes physical or emotional harm to such student or damage to such student's property, (ii) places such student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school. Bullying shall include, but not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics. Connecticut General Statutes §10-222(d)

Parents, who are advocating the application of the District Court’s four-part test argue in their brief against the use of the Connecticut statutory definition of bullying, by pointing out that the District Court in *T.K. v. New York City Dep’t of Educ.*, 779 F.Supp. 2d 289 (E.D.N.Y. Apr. 28, 2011) did not require that the harassment student experienced meet a state statutory definition of bullying as part of the four-part analysis. Parents did not cite a definition of bullying in their brief and failed to note that while a state statutory definition was not explicitly referenced, the District Court apparently recognized the need to provide a definition of bullying before applying the four-part test and provided such a definition in Section II (E)(1) of its decision.

While use of Connecticut’s statutory definition of bullying is not mandated; it is not prohibited. Using the definition the Districts are already required to use when investigating any bullying incident, provides consistency for school districts and parents who may need guidance on how to address and more importantly prevent harassment of special education and general education students in schools.

Student was clearly the subject of an extremely inappropriate and hurtful comment by her Spanish teacher. (Finding of Fact 55) The hurt caused by the teacher's comment was exacerbated by the actions of a classmate who was clearly emboldened by the Spanish teacher's comment. (Finding of Fact 55) There were two other incidents in which Student's perceptions that students were being unkind to her were verified, one in which a peer told Student to get a tissue and one in which a girl made comments to Student about being late to class and then said goodbye to Student at the end of class in a way that Student found upsetting. (Findings of Fact 56 and 60) To the extent the classmates in these incidents did not repeat such behaviors, those actions do not meet the definition that such actions be repeated under the Connecticut definition of bullying or capable of being repeated under the OSEP definition; and if there is no bullying, the first part of the District Court test was not met and a substantive violation under *T.K. v. New York City Dep't of Educ.*, 779 F.Supp. 2d 289 (E.D.N.Y. Apr. 28, 2011) cannot be found. Assuming arguendo, that the acts of bullying reported by Mother met the definition of bullying under the statute, the District staff investigated these acts as they were reported and took action when they deemed it necessary to do so (Findings of Fact No. 60-67) The District's actions demonstrated that the District was not indifferent to Student's reports and took reasonable steps to address issues as staff was made aware of them. As such the third prong of the District's four part test is not met and there can be no finding of a substantive denial of a FAPE to Student under *T.K. v. New York City Dep't of Educ.*, 779 F.Supp. 2d 289 (E.D.N.Y. Apr. 28, 2011)

In *T.K. v. New York City* 810 F.3d. 869, 67 IDELR 1 (United States Court of Appeals, 2nd Circuit (2016)), the Court found that the District violated Student's procedural safeguards by repeatedly refusing to address Parent concerns about bullying both within PPT meetings and outside of them. Parent concerns about bullying were responded to by District as each incident was brought to the attention of the staff. Further, there was no credible evidence that the District refused to discuss bullying incidents with Parents at PPT meetings. In addition, the District acted proactively in response to Parent concerns about specific peers by changing locker locations and arranging schedules to limit interaction between peers. As such, no procedural violation occurred and there was not denial of a FAPE on these grounds.

6. The District's refusal to have Dr. Heitzman observe the proposed placement was reasonable and did not violate Parents' procedural safeguards. While the Department of Education encourages parents and districts to work together to find ways to meet the needs of students and suggests that parent observation is one way in which needs might be met, it has published guidance stating unequivocally that "...neither the IDEA nor the regulations implementing the statute provide parents with a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed placement." *Emphasis added.* OSEP's *Letter to Mamas*, dated May 26 2004 (42 IDELR 10). It may be necessary for an Independent Educational Evaluator to observe a child as part of his or her evaluation and if so, he or she is entitled to do so pursuant to 34 CFR §300.502. OSEP has issued guidance clarifying that any Independent Educational Evaluator must be afforded the same opportunity to observe that would be provided to Board staff when they were initiating an evaluation. (See OSEP Letter to Savit February 10, 2014

(64 IDELR 250) At the time Parents requested Dr. Heitzman observe Student's potential placement, Dr. Heitzman had already transitioned from the role of an evaluator and consultant to that of Student's therapist. (Finding of Fact No. 52) Having transitioned into a therapeutic role, Dr. Heitzman was precluded from serving as an evaluator going forward. Testimony of Dr. Heitzman. (Finding of Fact No. 52) Since Dr. Heitzman was not conducting an Independent Educational Evaluation and by the changed nature of his work with Student was precluded from doing so, the District was not required to allow him to observe the proposed placement. The District's refusal of the request for Dr. Heitzman to observe was not a procedural violation of the IDEA. Further, Dr. Heitzman's stated purpose for observing was to determine whether there were too many students with disabilities that manifested themselves in outward physical appearance and/or in atypical behaviors, because Dr. Heitzman had generated a theory that Student being in the presence of children with more outwardly apparent disabilities, exacerbated her anxiety which in turn negatively impacted her learning. (Finding of Fact, p. 73) Setting aside consideration of whether this theory runs counter to the spirit of the Least Restrictive Environment underpinnings of the IDEA, the request to observe ninth grade collaborative classes while Student was still in eighth grade did not make sense. The ninth grade collaborative classes in 2015 would not have the same students as were in the ninth grade collaborative classes in 2014. If the goal was to make sure that Student was segregated from students with Down syndrome or who manifested autistic behaviors, then an observation would have to take place after school had started in 2015 in order to accurately assess the makeup of the class. Dr. Heitzman's observation would not have been useful in addressing Parents' other concern, which was that the curriculum in collaborative classes was not as rigorous as that in the non-collaborative classes. In addition, Dr. Heitzman was not certified to teach middle school in classes in the subject areas in which he sought to observe. District did offer to have Dr. Heitzman observe Student in her placement.

6. Parents are seeking reimbursement for their unilateral placement of Student at the Spire School for Student's ninth grade year. Under the IDEA, a hearing officer is authorized to order retroactive tuition reimbursement if there is a finding that the District did not make a FAPE available in a timely manner before Student's enrollment in the private program and if the private program is appropriate. 34 CFR §300.148(c) Parents assume the financial risk if they place their child in a private program without consent of the District. *Florence Cty. School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15 (1993). If Parents are not able to prove that Student was denied a FAPE, an analysis of the appropriateness of the private program is not required. If Parents prove that Student was denied a FAPE, then the second prong of Carter must be analyzed. When analyzing whether a private placement is appropriate for purposes of determining whether tuition reimbursement is appropriate, a lesser standard is applied. "A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 CFR §300.148(c) In the present case the placement is a state approved private special education school. (Finding of Fact No. 94) The Spire School is clearly a restrictive environment, however it is appropriate for the purposes of a unilateral placement. (Findings of Fact No. 95) While tuition reimbursement may be ordered upon a finding that Student was denied a FAPE and that the private program was appropriate, reimbursement may be reduced or

denied if Parents failed to provide notice of their intent to reject the placement, their concerns leading to the decision to unilaterally place the Student and their intent to enroll student in private school at public expense, parents do not consent to evaluation after notice of intent from the board, or upon a judicial finding of unreasonableness with respect to actions taken by the parents. 34 CFR §300.148(b) No claims of defective notice has been made. An analysis of the failure to consent to an evaluation and of the reasonableness of Parent's actions is required in order to determine whether there may be a reduction or denial of reimbursement. The District has the obligation to ensure to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114 (a)(2) In keeping with this obligation, at the September 2015 PPT meeting, Parents were offered the opportunity to have Student be evaluated for the EES program, which had become available during the summer following Student's eighth grade year. (Finding of Fact No. 87) The intake evaluation identifies a diagnosis for a student and develops a treatment plan with objectives to address needs flowing from Student's diagnosis. (Finding of Fact No. 87) Parents did consent for Student to be evaluated for ESS, because they were afraid Student would be singled out as a special education student was unreasonable. (Findings of Fact No. 85, 88). (Finding of Fact No. 88). If Student had been found eligible for the EES program, Student would have been able to receive special education and services very similar to those provided by the Spire school in a far less restrictive environment. (Findings of Fact 86 and 96) Thus, reimbursement for the 2015-2016 school year is not appropriate due to the refusal to consent to the evaluation for ESS and the unreasonableness of Parents actions in choosing not to cooperate with the District in its efforts to find the least restrictive placement for their child.

8. Parents request as equitable relief two years of education at the Spire School, reimbursement of private tutoring, reimbursement of counseling provided by Dr. Heitzman in 2015-2016 and reimbursement of the costs incurred in hiring the educational consultant. Parents' request for tutoring reimbursement is not appropriate. The tutor's time was not spent in direct instruction in executive functioning skills and most of it was spent assisting Student in the completion of homework. (Finding of Fact No. 50) Some of the sessions were for SSAT test preparation. (Id.) The tutor was not making up for the work that had not been done by the case managers, who were putting an enormous amount of time and effort into Student's program. Rather tutor was relieving Parent of the task of helping Student with her homework at the end of the day. (Finding of Fact No. 50) Further, the tutor's level of assistance was counter to goal of Student being able to internalize strategies and fade support. The equities weigh against an award of two years of prospective placement at the Spire School, where Parents have interfered with the District's attempts to offer a program with similar services to Spire in a far less restrictive environment and as such a prospective placement is not awarded. (P-88) Dr. Heitzman was engaged as a therapist for Student as a result of Student's unsuccessful experience in a summer camp. (Finding of Fact No. 52). To the extent Parents sought out therapy to help Student address issues that manifested themselves during her summer experience,

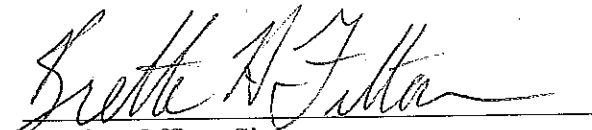
reimbursement is not warranted. For no clear reason, the educational consultant chose not to consult with anyone in the Fairfield Public School system when conducting her review of Student's educational records. (Finding of Fact No. 80) The educational consultant critiqued the rigor of the proposed program based on Parent report, which was in turn based on hearsay from other parents. (Finding of Fact No. 70) These choices call into question the foundation of conclusions reached in the report. Parents had clearly conferred with the educational consultant and obtained her recommendations prior to the issuing of her report on a Saturday, as evidenced by Parent's enrollment in Spire School the following Tuesday. To the extent the report is deficient and codified a decision that was already made by the Parents, reimbursement for this expenditure is not warranted.

FINAL DECISION AND ORDER:

1. The District did not deny Student a FAPE for that portion of the 2013-2014 school year beginning on September 23, 2013 and running through to the conclusion of the school year.
2. The District did not deny Student a FAPE for the 2014-2015 school year.
3. The District's IEP developed by the District for the 2015-2016 school year was not appropriate and The Spire School, where the Student has been unilaterally placed, provides Student with an appropriate program.
4. The District is not ordered to reimburse Parents for The Spire School tuition for the 2015-2016 school year.
5. Parents are not entitled for reimbursement for tutoring services provided to Student at Parent expense during the 2014-2015 school year.
6. Parents are not entitled to reimbursement for private evaluations and consultative services during the 2013-2014 and 2014-2015.
7. Compensatory education is not awarded.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).


Hearing Officer Signature

Brette H. Fitton
Hearing Officer Name in Print