

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Westport Board of Education

Appearing on behalf of the Parents:

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Appearing before:

Christine B. Spak, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer an appropriate IEP for the student for the 2001-2002 school year?
2. If not, did Eagle Hill School provide the student with an appropriate program for the 2001-2002 school year?
3. Is the Board responsible for the payment of tuition at Eagle Hill for the student for the 2001-2002 school year?

SUMMARY:

The student, currently age eleven, was identified as having a specific learning disability by the Board during the 1998-99 school year. The student had attended the Board's elementary school programs through the end of the 2000-01 school year which was the end of his fourth grade year. At a PPT meeting convened on May 16, 2001, the Parents rejected the Board's proposed IEP for the 2001-02 school year and informed the Board of their intention to place the student at Eagle Hill-Southport, a private special education school. The student was placed at Eagle Hill-Southport by his Parents for the fifth grade commencing with the current 2001-02 school year, at the Parents' expense,

after the Board rejected their request for this private school placement at the May 16, 2001 PPT meeting. B-62 (4,5).

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. S&H Computer Systems, Inc.*, 605 F. Supp. 816, (March 6, 1985) and *Bonnie Ann F. v. Callallen Independent School District*, 835 F.Supp.340 (S.D.Tex. 1993).

PROCEDURAL HISTORY:

The Parents requested a Due Process Hearing in a letter dated October 10, 2001 to contest the appropriateness of an IEP dated May 16, 2001 for the 2001-02 school year. B-62. A prehearing conference was convened on October 18, 2001 and the hearing was conducted on the following dates: The hearing commenced on December 5, 2001, and continued on December 7, 11, 13, January 28, February 1, 4, 8, March 5, 7 and 14, for a total of 11 days. The Parents presented four witnesses: the Mother, the Father, Ellen Horowitz and Sherrill Werblood. The Board presented four witnesses: Sue Cooper, Mary Ellen Barry, Grace Welsch and Cynthia Gilcrest. The Board submitted a total of 83 exhibits (B-1 through B-83) and the Parents submitted six exhibits (P-1 through P-6) and the hearing officer had two. The date for mailing of the final decision was extended upon mutual agreement of the parties to July 1, 2002, and by the hearing officer after reviewing the briefs, until July 11, 2002.

FINDINGS OF FACT:

1. The student attended kindergarten at Long Lots School, one of the Board's elementary schools, beginning in September of 1996. On November 4, 1996, a Child Study Team referral was made based upon the student's difficulties in focusing and social skills. He was reported to be a very happy and socially accepted child who gravitated toward and followed the mannerisms of the more active and dominant children. This sometimes caused social problems that at that time were starting to break down friendships. These behaviors included such actions as grabbing others toys and breaking down others block buildings. The Parents reported that the student was having difficulties at home dealing with a number of significant changes which included a new house, a new baby brother and a nanny leaving. He was jealous of his baby brother and was spilling things and hitting his brother repeatedly for attention. They indicated that because there were no immediate relatives around, they over-compensated by giving the student material items to excess. (Exhibit B-1)
2. The Long Lots Child Study Team convened on November 13, 1996. It was stated that the Parents were having difficulty with the student's behavior at home and sibling rivalry was an issue. He was intermittently acting out in the classroom. The minutes of the Child Study Team indicate that the modifications that the teacher had recommended had been working and would be continued. The Child Study Team made recommendations for modifications in school (structure, feedback, consistency)

and at home (focusing on positives, redirection.). The Parents believed that the kindergarten teacher was an excellent teacher. (Exhibit B-2, Testimony, Mother)

3. The student continued to attend Long Lots School for first grade, which was the 1997-1998 school year. His teacher was Ms. Hecht whom the Parents believed was an excellent teacher. The student received supportive reading assistance in a small group of four to six children. During first grade, the school called the Parents to say that the student was having problems with his vision. The Parents were not aware of this problem, but took him to an ophthalmologist who found that the student could not see two feet in front of him. The vision problem slowed his progress in first grade. However, he was prescribed glasses and the problem was effectively addressed. (Testimony, Mother)
4. The student's first grade report card reflected that he had made progress in several areas of language arts and mathematics but was experiencing difficulty throughout the year in the areas of reading decoding and fluency. He had improved in his understanding of how letters and sounds relate, although he lacked self-confidence in his developing reading ability. He had developed self-confidence in his writing and had become a more independent writer. He had worked hard to remain on task during independent work time and was helped by preferential seating and the use of his glasses in group lessons. He was a well-behaved and well-liked child. Mother agreed that the report card accurately reported the student's progress in first grade. (Exhibit B-3, Testimony, Mother)
5. The student attended Long Lots School for second grade, which was the 1998-1999 school year. His classroom teacher was Ms. Sullivan, who was described by Mother as a good teacher. At the beginning of the school year, a PPT was scheduled and was convened on September 24, 1998. It was reported at this PPT that the student was happy and loved school, was proud of the work that he accomplishes, participated in class and verbally expressed himself appropriately. It was also reported that the student could be fearful of answering questions wrong, distracted himself and others in groups and in reading was having difficulty attacking new words. Mother reported that the student was fearful of making mistakes, that that fearfulness overflowed into all aspects of his life, including sports and that she was working very hard on his homework with him. The team agreed that the following assessments would be performed: cognitive, processing, attention, memory, behavior rating scales, developmental history, reading, social emotional, auditory processing, writing, math and visual processing. The Parents signed consent for these evaluations. (Exhibit B-6, Testimony, Mother)
6. As part of the agreed upon evaluation, in October of 1998, Diane Shannon, a special education teacher, performed academic testing of the student. She performed a classroom observation, the Woodcock Johnson Tests of Achievement and the Slingerland Screening Tests. The evaluation report completed by the special education teacher at that time found the student's Reading, math and writing scores were in the below average range. The student's auditory and visual processing were

reported to be in the average range. The teacher's findings contrasted with the school psychologist's report, which reported that the student's scores were below average in the areas of auditory and visual processing. (Exhibits B-7, B-8)

7. The student's Parents and the Board met at a PPT meeting on November 5, 1998 to review the Board's evaluation reports, determine eligibility for services and to develop an IEP. It was noted that the student had been receiving supportive reading services daily. All of the evaluators reviewed their evaluations. It was agreed that the student qualified for special education services as learning disabled and IEP goals and objectives were developed and reviewed. It was agreed that the student would receive 5 hours per week of special education instruction. Ms. Horowitz, the Board's speech and language therapist, recommended that the student receive one hour per week of speech and language services for a period of eight weeks to work on phonics. During the PPT, the Mother asked how long it would take for the student to make progress and it was explained to her that the progress would be based upon the goals and objectives. Homework was to be modified for the student and there would be communication with the Parents concerning areas of focus of progress at least monthly. (Exhibit B-12)
8. These are parents who typically did not question the student's goals and objectives. (Testimony, Cooper)
9. The parties met again at a PPT meeting on May 10, 1999. The Board reported improvement in the student's progress in the areas of reading, math, and social development, phonemic awareness, and writing at the May 10, 1999 PPT meeting. The Board reported difficulties and concerns with the student's decoding skills, time on task, self-esteem, attention, and word attack skills. The Board had reported that the student had mastered or achieved satisfactory progress in many of his 1998-99 IEP goals and objectives. Ms. Horowitz recommended a reduction in her speech and language service hours from one hour to one-half hour per week. The PPT recommended that the 1998-99 IEP goals and objectives remain in effect through November, 1999, when another PPT meeting would be scheduled. Due to a school redistricting plan, the Parents were informed that the student's placement for the 1999-00 school year would be changed from Long Lots School to Green Farms School. The Parents expressed their concern with the transition from Long Lots School to the Green Farms School at this meeting. They wanted a small class size, structured classes, and an experienced teacher for their son. (Exhibits B-17, B-20, Testimony, Father, Testimony, Mother, Testimony, Horowitz)
10. For the third grade, the student was assigned to a relatively new and inexperienced regular education teacher and a relatively new and inexperienced special education teacher. Although the Parents felt that some educational progress was made this year, it was the first time, on balance, that they were dissatisfied with the staff and started to lose faith in the program. The Mother testified that the third grade was a bad year for their son. Neither the third grade regular education teacher nor the third grade

special education teacher testified at hearing. (Testimony, Mother, Testimony, Father)

11. The annual review PPT meeting convened on November 3, 1999. The Board reported concerns with the student's ability to segment and/or blend words with more than three sounds, attention, written communications, word attack skills, decoding, math word problems, spelling, reading comprehension, and following written directions. The Board reported progress on the 1998-99 IEP goal and objectives. Specifically, Ms. Frederick, the Board's speech and language therapist, reported that the student was making progress toward achieving his goals. Ms. Horowitz had left the Westport Public Schools at the end of the 1998-1999 school year. She began a private practice, and in September of 1999 she began seeing the student privately twice a week, for a total of one and a half hours per week. She recommended that the student have this private speech therapy, although at the May 1999 PPT, only six months prior, she had recommended a reduction in the number of hours of speech and language services that the student required. The mother stated that the student feels stupid and questioned why he was having difficulty in school. In response, it was recommended that the student receive counseling services in school. IEP goals and objectives were proposed, including a goal regarding the student's ability to discuss his learning style. Those goals, to be implemented from November of the student's third grade year through November of his fourth grade year, included reading second grade level sentences and demonstrating improved spelling skills related to second grade curriculum. (Testimony, Mr. Horowitz, Exhibits B-23, B-24, B-25, B-26)
12. The student was having difficulty with his homework in third grade and the Mother would spend three to four hours per night working with the student on his homework. A parent teacher conference was held in March of 2000. When the mother reported this to Ms. Frost sometime later in the year, Ms. Frost set up a system where Ms. Frost would review the student's homework with him in school and make sure that he started it with her before he went home. (Testimony, Mother)
13. A PPT was convened on April 19, 2000. In addition to the school based team members and the Parents, this PPT was attended by Ellen Horowitz at the request of the Parents. Ms. Frost discussed the need to modify the student's homework and that pre-teaching was necessary for success. The Parents reported that the student was enjoying reading out loud more at home. CMTs were discussed and it was agreed that the student would take out of level CMTs in the fall if they were available. Ms. Frost recommended increasing the student's special education time in 4th grade, with an additional 2.5 hours per week to be delivered by the special education teacher in the classroom. The Parents agreed with this recommendation. The team also agreed that speech and language services should be increased to 1 hour per week. The Parents expressed concern with who the student's teachers would be for fourth grade. They wanted to make sure that the student's teachers were experienced. The team recommended an extended school year at that meeting. The Parent requested the Board to provide the educational materials for ESY since they had decided to send the

student to summer camp. Ms. Frost agreed to provide the information the student required for the camp. (Exhibits B-31, B-38, Testimony, Mother)

14. The student went to a sleep away camp for the summer of 2000. He was nine years old at the time. He went to camp for eight weeks. The Parents visited him only once during this eight week period for one day. The Parents arranged for the student to receive tutoring at camp over the summer. The Mother took materials that Ms. Frost had put together. The materials were CMT practice books, math papers and readers. The tutor generated a report but the Parents did not share it with the Westport staff and the Westport staff did not ask for it. (Testimony, Mother, Testimony, Father, Testimony, Mrs. Cooper)
15. The Parents claimed that the student needed consistency, continuity and structure, and needed to be instructed by teachers with skill and experience. However, the tutoring that the Parents provided for the summer of 2000 was delivered by an individual who had never met the student, was not a certified special education teacher, and did not communicate with any of the Westport staff about the student. The summer tutor did not have the student's IEP goals and objectives. In addition the student went to a camp where there were no Westport students attending. According to the Mother, the student did not like change and had difficulty making adjustments. However, she and the Father reported that the student had no difficulties adjusting to this environment and to being away from family for eight weeks and was happy and had a positive camp experience. "He did great from the day he left". He was not homesick. (Testimony, Mother; Testimony, Father)
16. The student was assigned an experienced regular education teacher, M. Barry, and an experienced special education teacher, S. Cooper, for the fourth grade year. (Testimony, Mother; Testimony, Cooper; Testimony, Barry)
17. Both the Board and the Parents had recognized that the student had anxiety associated with the CMT at the beginning of the 2000-01 school year and with re-entering the classroom from the resource room. The student did not want to take the out of level CMTs because he did not like to appear different from other students. He did, however, take the out of level CMTs. On the issue of re-entering the classroom from the resource room, Ms. Cooper and Ms. Barry discussed strategies to be used to assist the student with the anxiety that he was experiencing when he re-entered the regular classroom from the resource room and regarding following directions. They gave strategies to the student, such as "take a deep breath", "listen until all of the directions are given". These strategies worked and by November of 2000, the student was demonstrating very little anxiety in the regular education classroom. He really "settled in" once the CMTs were over. (Testimony, S. Cooper; testimony, M. Barry)
18. At the beginning of the 2000-2001 school year, in September or early October, approximately five or six students in Ms. Barry's class chose to run for student council representative. The student was one of those students. He stood up in front of the class and gave a speech to the class, saying that he would be responsible, would

be able to get to the meetings, and that he was comfortable talking to groups of people. The student did not win the election at the beginning of the school year. He seemed to be fine with not winning. (Testimony, Barry)

19. The Parents testified that the student was a very social child who nonetheless had high anxiety about school. (Testimony, Mother, Testimony, Father)
20. New student council elections were held at the beginning of the second semester, in January of 2001. The student ran again. He gave a speech again. Three or four students, including the student, ran for the representative positions. This time the student won and he served as student council representative for his class from January through June of 2001. His responsibilities were to attend the student council meetings twice a month, report to his class about what happened at those meetings, then get input from the class, and report back to the student council. He also was responsible for going to a buddy class meeting with a first grade class and inform them what happened at the student council meetings. (Testimony, Barry)
21. The student performed all of his responsibilities as student council representative well and demonstrated good leadership skills. He was comfortable presenting to his class as well as the first grade class. He demonstrated strong self-esteem. Even though the student had lost the election at the beginning of the year, he was comfortable running for student council second semester and taking the risk of losing again. (Testimony, Barry)
22. As of the beginning of the 2000-2001 school year, Ms. Cooper provided a total of 7.5 hours of special education services to the student per week, of which five hours per week were in the resource room and 2.5 hours were in the regular classroom. When the student came to the resource room, there were two other fourth grade boys who came with him, one of whom was in the student's fourth grade classroom. The instruction in the resource room was either individual or direct instruction to the group of three. The other boys in the group had needs similar to the student's and the boys all got along well. Ms. Cooper believed that the student "absolutely" felt comfortable in that group, particularly since one of the boys (the one who came from the same classroom), was his best friend. The student came to the resource room willingly. (Testimony, S. Cooper)
23. The parties met at an annual PPT meeting on November 14, 2000. The Board reported progress in some areas but continuing concerns with the student in the areas of reading comprehension, writing, and math. At this PPT the student's overall time in special education and related services each week was decreased from fourteen (14) hour hours, to twelve and one half (12.5) hours per week, (Exhibit B-38) to eliminate the co-teaching component. The regular education teacher testified that the co-teaching had been eliminated because it was not productive, difficult to coordinate and was causing the student to feel uncomfortable by having Mrs. Cooper co-teach in Mrs. Barry's classroom. The student did not like to feel different and the paraprofessional blended in better in that she helped other students as well as the

student at issue in this matter, whereas Mrs. Cooper helped only this student. (Testimony, Barry, Exhibit B-45)

24. The Board had failed to implement the provision calling for a tape recorder for taping regular education class materials or to provide textbooks on tape as a regular education classroom accommodation during the 1999-2000 school year as provided for in the student's IEP, (Exhibits B-30 (18) and B-38 (9)). At the November 14, 2000 PPT meeting this accommodation was eliminated without any adequate explanation. The Parents did not object to this elimination or raise this as an issue at a PPT. (Exhibit B-45)
25. Ms. Barry, the fourth grade regular education teacher, testified that this student was the lowest overall in reading comprehension and fluency. At the beginning of the fourth grade, the range of independent reading levels of the students in her class went from the beginning of second grade to the sixth grade level. Without this student in the class, the range would have been from the beginning of third grade to the sixth grade level. She further testified that if the other students were asked who needed the most help from the aide, the children would identify this student, although they knew the aide was not his alone. (Testimony, Barry)
26. Throughout this year the Parents frequently asked both Ms. Cooper and Ms. Barry when the student would "close the gap". When first asked this question, Ms. Cooper explained that it was more important to understand his learning styles and needs rather than compare him to other students. She explained that the student was making slow but steady progress. From the beginning of school through January, the Parents asked Ms. Cooper at least ten times when the student would "close the gap", despite Ms. Cooper's explanation to them that she could not predict the answer to that question. They asked the same question of Ms. Barry approximately six times during the school year. She told them that it was very hard to judge when a student is going to close the gap and that is not something that could be predicted. She explained how students progress at different rates. While Ms. Barry thought that it was appropriate for parents to initially question when the gap would be closed, when the question was constantly asked, it led Ms. Barry to believe that either the Parents did not understand her answers or they did not believe her answer. (Testimony, Barry, Testimony, Cooper)
27. Ms. Cooper testified that in January, 2001, solely because of the Parents' repeated questioning as to the student's reading level, she administered the Woods and Moe, an analytical reading inventory, which is an informal reading assessment. Although she does not normally administer this test, Ms. Cooper administered this particular test to the student because the Parents wanted to know specifically what reading level the student was at and the results of the Woods & Moe were reported based upon grade levels. The test consists of an oral reading done by the student, after which the examiner asks comprehension questions. The examiner records the errors. There is another portion of the test which is a reading of word lists. The content of the test is leveled based on assigned grade levels, starting with a primer level, with each

numbered level correlating to a grade, i.e., level one is the first grade level. The Woods and Moe is not a nationally normed evaluative tool. Based on this evaluation, in January of 2001, the student was performing approximately a year to a year and a half below grade level. More specifically, the results of the January assessment were as follows:

- On the word lists, the student was independent at the second grade level and performed at the third grade instructional level.
- On the word recognition, the student was independent at the second grade level and performed at the third grade instructional level.
- On comprehension, the student was between independent and instructional at the second grade level and at the instructional third grade level.

These results were very consistent with how the student was performing for Ms. Cooper. At this time, she was teaching the student reading at the third grade level. (Exhibit B-50, Testimony, S. Cooper)

28. In January, Ms. Cooper provided a report which reflected that the student had made good progress on his IEP goals and objectives; all of the objectives were marked as the student having made satisfactory progress except that he had mastered one objective and partially mastered another. When Ms. Cooper marked an objective as "S", she meant that she expected that the objective would be mastered within one year's time. He was progressing in reading and was beginning to transfer his skills to reading in context. His comprehension skills were good and he had become more eager to write. The only part of the language arts curriculum that is mentioned as remaining a challenge to the student is spelling. His progress in math was variable; he was progressing slowly in learning his multiplication tables but he was learning strategies to help himself. (Exhibit B-50, Testimony, S. Cooper)
29. The parties had an informal meeting in January to discuss the results of the Woods and Moe and met again on February 6, 2001 for a PPT. The purpose of this meeting was to review the student's progress and to implement changes to the student's program that had been discussed informally between the Parents and the teachers during January, 2001. Due to the student's difficulties in his regular education classroom in the areas of reading, language arts, and continued homework problems, the team had recommended that the special education teacher, Sue Cooper, "take over" the student's reading and language arts instruction in the resource room and that she monitor the student's homework. The classroom teacher reported that the student was on grade level in science and social studies and that he was below grade level in math and language arts. The Parents continued to express their concerns that in their opinion their son was falling further behind. The Parents were concerned that their son was not making appropriate progress. The IEP goals and objectives were not revised. The student's overall time in special education and related services was increased from the twelve and one half (12.5) hours to fourteen and one half (14.5) hours per week to reflect the increased time in the resource room. (Exhibits B-45, B-55; Testimony, Cooper, Testimony, Barry, Testimony, Father, Testimony, Mother)

30. When questioned by the hearing officer as to why she took over the language arts program as of the February 6, 2001 PPT, the special education teacher testified that, as the year went on, the books became more difficult and she felt the student needed her assistance and the increase in service hours. (Testimony, Cooper) This was right after she had given the student a good progress report on all of his goals and objectives, including all those concerning language arts (January 2001). (Exhibit B-82)
31. A continuing problem was homework. The Parents reported that the student was having a lot of difficulties with his homework, that his homework was too difficult for him, that it was taking him a very long time to do his homework, and that he would have “meltdowns” when he did his homework. Throughout the year, the members of the team made various modifications regarding homework, and gave suggestions to the Parents regarding how to handle homework with the student. (Testimony, Mother; Testimony, Cooper; Testimony, Barry)
32. The following constituted some of the modifications and recommendations made by the school based team for the student’s homework:
- Mrs. Barry and Ms. Cooper conferred about the homework assignments, with Ms. Barry usually showing Ms. Cooper the assignments she was giving the class a week in advance. Ms. Cooper would then modify the homework either for quantity (such as reducing the number of math problems) or would provide the student with a separate paper totally.
 - Prior to the end of the day, the paraprofessional would meet with the student and review homework with him. She would make sure that the student had properly copied down the homework assignments and that he was taking home whatever he needed to do. She would reread the directions with him, and do the first problem or problems to make sure he could do them and felt comfortable with them.
 - When the Parents reported that the student was having meltdowns, Ms. Cooper recommended to them that they walk away from the student, saying to him, “I can’t help you when you’re upset like this”. She recommended that they then let the student calm down so that he would understand that they could not help him when he was crying.
 - Ms. Barry and Ms. Cooper told the Parents that if the student was reporting that the homework was too hard for him, he should stop doing homework and the Parents should write a note to them and they would go over it the following day.
 - The Parents continued to use an egg timer to signal when it was time for the student to stop doing homework. (Testimony, S. Cooper, Testimony M. Barry, Testimony, Father, Testimony, Mother)
33. Ms. Cooper spoke to the student as to why he was telling his parents that he could not do his homework. In some instances, he would do in class for Ms. Cooper the

homework that he claimed he could not do at home the prior night. When Ms. Cooper asked the student why he was telling his Parents he could not do the homework and was giving his parents such a hard time, “there would be a little smile on his face” and he would say that he didn’t know. Ms. Cooper believed and it is herein concluded, that the student was playing a game, that he would get everybody at home involved in his homework, and that he was manipulating his Parents. It was Ms. Cooper’s opinion, and it is herein concluded, that there was a power struggle between the student and his Parents. The Mother agreed that the student was being manipulative. The Father agreed that the student was being theatrical and trying to get a rise out of his Parents. (Testimony, Father, Testimony, Mother, Testimony Cooper)

34. On February 6, 2001, Ms. Cooper, in conjunction with the school psychologist and the Parents developed a homework contract for the student. All of the components of the homework contract had previously been suggested to the Parents. The homework contract set a 20 minute limit for the student for each of his three homework subjects (reading, writing, and math); required that he do his reading homework first; excused him from Wednesday homework because of his special activities; and provided that if the student was having difficulty with any part of his homework, and could not do it by himself, he would bring it to school the next day and the Parents were to write a note that he had tried. The contract was signed by the student, the Parents, Ms. Cooper, Ms. Barry and Ms. Pratt. (Exhibit B-56, Testimony, S. Cooper)
35. Ms. Cooper believed that the homework contract worked at first. For a while after it was first instituted, Ms. Cooper did not hear about any homework problems. On February 14, the Father reported to Ms. Cooper that homework was going OK. The first report that Ms. Cooper received from the Parents of problems with homework after the homework contract went into effect was on April 25, 2001, when the Mother called to say that the student was having difficulty inferring from the text. (Exhibit B-66, pp.10-11, Testimony, Cooper)
36. The Parents claimed the homework issue was never effectively addressed. However, on cross examination the Mother acknowledged that she sometimes found it too difficult to stick to the homework contract and guidelines because of the intensity and persistence of the student’s response when she tried to follow the contract and guidelines. For example, Mrs. Barry wanted the student to do his reading homework first because it is the most difficult for him. At times when the student insisted on doing math homework first, the Parent gave in. The Board wanted each subject area limited to twenty minutes, but at times when the student insisted on working longer even though it would lead him to the point of frustration and failure, the Parent allowed it. (Testimony, Mother, Testimony, Cooper)
37. The parties met at a PPT meeting on March 8, 2001. The Parents had expressed their appreciation to the Board’s staff but they remained concerned that the student would not be ready for middle school and they questioned the adequacy of the educational supports that were in place. The Parents continued to express their concern that the

student was below grade level and that he continued to have self esteem issues. They wanted to see the student “close the gap.” There were no changes to the student’s IEP goals and objectives. (Exhibit B-59)

38. The student benefited from receiving education with non-disabled peers. In fact, it was important for him to be in a class with non-disabled peers. He heard students using vocabulary that he might not be using and listened to the types of questions that the other students were asking. He gained from hearing the ways that the non-disabled children solved problems. His strong social skills made him a part of the group and other students listened to the student, which helped his self-esteem. He was on grade level in the content areas of social studies and science. He showed leadership skills in class and was a respected member of the school community. (Testimony, S. Cooper, Testimony, M. Barry)
39. The parties met at a PPT meeting on May 16, 2001. The Parents expressed their concerns regarding the Board’s special education program and disagreed with the progress reported by the Board during the 2000-01 school year. The Parents had expressed their belief that the student had “fallen further and further behind,” and that the so-called “gaps” had not in fact “narrowed.” The Parents requested certain modifications for the student’s program at Greens Farms School for the 2001-02 school year. They had requested smaller class instruction throughout the student’s day, in addition to more remediation, for the 2001-02 school year. However, the Parents did not believe that the Board had provided an appropriate response. They had requested the PPT to place their son at Eagle Hill School. One of the reasons they had selected Eagle Hill was their belief about the availability of small class sizes, one teacher to six students (1:6) throughout the entire school day and the remediation that was available for the student at that private school. (Exhibit B-62, Testimony, Barry)
40. The Board reported that the student was reading below grade level, at approximately third grade level at the May 16, 2001 PPT. (Exhibit B-63 (4)).
41. Less than a month later, the Board reported that the student was reading at Level 3-Instructional with 95% correct and Level 4-instructional with 75% correct, per a Woods and Moe evaluation. (Exhibit B-72)
42. If the student had returned to Greens Farms School for the 2001-2002 school year, his fifth grade special education teacher would have been Grace Welsch. She is a fifth grade special education teacher at the Greens Farms School and holds a masters’ degree in elementary education and has 24 hours towards a 6th year degree in special education – learning disabilities, from Fairfield University. She has over 22 years of teaching experience. For 14 of those years she worked at the Westport Regional Center with more severely learning disabled and socially emotionally impaired children. She is certified in both regular and special education. During her professional career, she has taught approximately 200 to 250 students with learning disabilities, ranging from mild to severe. (Exhibit B-83, Testimony, G. Welsch)

43. Ms. Welsch has never met the student. She would have been his special education teacher and case manager had he attended Greens Farms School for the 2001-2002 school year. She would have had responsibility for the implementation of his IEP.
44. Ms. Welsch is responsible this year (2001-2002) for eleven 5th grade special education students at Greens Farms School. Of these students, six are boys and five are girls; seven are identified learning disabled, two are identified with a language disability and two are identified as multiple disabilities, which includes learning disabilities. This year she works only with fifth grade students. All of these special education students receive Ms. Welsch's services in her resource room, as well as in the mainstream class. There are two to five students in the resource room at any given time. The children are grouped according to their needs and based upon their IEP goals and objectives. (Testimony, G. Welsch)
45. Given that she had never met, observed, or taught the student, much of Ms. Welsch's testimony regarding the student had been based on preparation for the hearing. For example, she testified that on an informal ten point scale she would rate him a seven as to severity of disability, with half of the students she has taught in her career scoring above seven and half below. Later, on cross examination, she admitted that it is important to meet the student before a teacher forms an opinion about the severity of his learning disability. (Testimony, Welsch)
46. Ms. Welsch has a computer in her classroom and all students have access to it. She uses a software program called Inspirations. She prefers to use the Alpha Smart with her fifth graders, which is a portable word process device which facilitates note taking and projects. (Testimony, Welsch)
47. Comparing the student to the other 11 special education fifth grade learning disabled students at Greens Farms School, in Ms. Welsch's opinion, the student would compare with those students in the following skill areas as follows:
- In reading and math, two of the students would be below the student, four would be above and five would be at his level.
 - In written expression, two of the students would be below the student, and seven would be at the student's level. (Testimony, G. Welsch)
48. Ms. Cooper and Ms. Welsch developed a tentative schedule of the student's week had he attended Greens Farms School for the 2001-2002 school year. That schedule reflects where and how the student would have received both his regular education and special education services in fifth grade at Greens Farms School had he attended. The student would have begun his day in a morning meeting of the Responsive Classroom, which is the curriculum used in the school to teach children to respect differences. He would have received his math and language arts in the resource room with Ms. Welsch. He would be in the regular education classroom with

paraprofessional support for writing, social studies/science and computer. In addition, he would have an hour of art per week, and 40 minutes per week of physical education. He would have had the option of participating in band/orchestra or having an additional 40 minutes per week in resource room. He would have had two one-half hour study halls per week. He would have received speech and language services, and counseling services, in accordance with his IEP. He would have participated in lunch and recess with the fifth grade class. (Exhibit B-80, Testimony, Cooper, Testimony, Welsch)

49. If Ms. Welsch were the student's teacher, she would first work with him to determine what methods and strategies worked well for him. Although she had not had that opportunity, based on her experience in working with students like him, and based on his IEP and the reports she had read, she believed that with the student, to instruct him in reading, she would use drills, practice, workbooks, dictation, and application texts such as George's Marvelous Medicine by Raoul Dahl and James Gardener's Stone Fox. She discussed using non-fiction series such as the Treetop series for non-fiction reading. To teach writing, she would begin using an expository pillar, a form of graphic organizer, which is a technique that is used in the middle school as well. For spelling, she would use weekly spelling lists, using the Rebecca Sitton lists. For math, she would use the Marilyn Burns math program, which is a multi sensory approach to teaching math. She anticipated that she would continue the use of the homework contract. In some instances where students have complained that they could not do the homework and Ms. Welsch knows that they can, she has brought the parent into school, had the child sit down at the table and demonstrated the success in school with the homework assignment. (Testimony, G. Welsch)
50. In addition to never meeting, observing or teaching the student, Ms. Welsch had never met his parents, had not attended any of the student's PPT meetings during the 2000-01 school year and had not assisted with the development of the student's IEP for the 2001-02 school year. (Testimony, Welsch)
51. At the May 16, 2001 PPT meeting, the Parents informed the Board that they were rejecting the proposed IEP for the 2001-02 school year and they had requested the Board to place the student at Eagle Hill-Southport, a private special education school, commencing with the 2001-02 school year. The Board denied their request for placement at Eagle Hill School. The Parents requested Due Process thereafter. (Exhibit B-62)
52. The Parents reported that the student is doing "fantastically" at Eagle Hill. The home life is totally different, homework issues have diminished and the student is actively reading publications like *Sports Illustrated for Children* at home. They did not know the credentials of the teachers or whether they were certified in special education. (Testimony of Father, Testimony of Mother)
53. There was a significant amount of testimony about one of the fourth grade projects that occurred in the middle of the year. Beginning in approximately November of

2000, Ms. Barry assigned her fourth graders an astronomy research project where each child chose a planet and was to write a travel brochure, enticing visitors to come to their planet. The student chose Saturn for his project and he worked on his assignment both with Ms. Cooper and Ms. Barry and the paraprofessional. The project was modified for the student in several ways. One of the modifications was that while other children would do research as part of their homework, the student's research was done primarily in school, with the assistance and direction of either his teachers or paraprofessional. The student, with the assistance of Ms. Cooper or his paraprofessional, would find resources. Some of those resources the student could read and others were read to him by Ms. Cooper or his paraprofessional. The student then wrote most of the information himself on the cards based on the research materials. This research portion of the project took approximately three weeks. (Exhibit B-79, Testimony, S. Cooper, Testimony, M. Barry)

54. The Parents did not believe that the student had written his Saturn brochure. The Mother first testified that she believed that most of it was written by someone else. "There is no way that the student wrote that brochure." She later changed her testimony somewhat to state that the student could have written most portions of the brochure but that he was incapable of writing certain sentences that appeared in the brochure, such as "Jean Dominique Cassini found that Saturn has two rings and that there is a separation between those two rings." It is understandable that the Parents would be skeptical given at the beginning of this project the student was still working on an IEP that had a spelling goal related to the second grade curriculum, (Exhibits B-38, p. 5 and B-30, p. 11), a reading/decoding instructional goal at the second grade level (Exhibits B-38, p. 5 and B-30, p. 5), and a writing instructional goal related to the third grade level (Exhibits B-38, p. 5 and B-30, p. 8)
55. Both Ms. Cooper and Ms. Barry believed that the student had done a good job on his Saturn project. He met the criteria and the objectives that had been set for the project, which was to be able to use research skills and to produce a piece of writing that incorporated both fact and fiction, and to be able to present that information in an interesting and informative way. The student was very proud of his Saturn project. He was excited when it was on the computer and was finished. He was pleased with the finished product. He especially loved doing the fun facts about Saturn. (Testimony, S. Cooper, Testimony, M. Barry)
56. In January of 2001, a presentation was held so that the students could share their final product with their parents. Parents were invited to watch their children participate in a game of astronomy jeopardy and then the children would hand out copies of their brochures. Some of the students in the class asked Ms. Barry if prior to playing the jeopardy game, they could do an oral presentation about their project as an advertisement. Although this was not the purpose of the program or envisioned by Ms. Barry as a component of the presentation, Ms. Barry consented to this request, but told the students that their presentations had to be brief. (Testimony, M. Barry)

57. The 21 students in the class presented the astronomy project to approximately 30 adults. The program began with each child doing the brief oral presentation, followed by the game of astronomy jeopardy, and ended with the children handing out their travel brochures to the adults. For the oral presentation the student spoke a line about his planet and, with a flourish, spun around. It was quite short but the student seemed happy and excited at the presentation. For the astronomy jeopardy, the student was a very active participant and his team did very well. The student was a major contributor to his team's success. (Testimony, M. Barry, Testimony, Father, Testimony, Mother)
58. The Parents were pleased with the student's participation in the jeopardy portion of the program and the Father expressed to Ms. Barry that he was proud of the student's participation and that the student really knew his stuff. (Testimony, M. Barry, Testimony, Father)
59. Both Ms. Cooper and Ms. Barry observed the student do his oral presentation and thought that he did a good job. It was appropriate within the context of what the other students were doing and the last minute nature of that portion of the program. The Father testified that as part of the Saturn project, the students made an oral presentation of their "report". According to his Father, the student said "Saturn, the ringed planet", spun around in a circle and "that was it". The Father testified that the students were reading their reports, which, according to Ms. Barry, was inaccurate. The Father asked the student why he did not do more in his presentation and the student told him that this was what he was comfortable with. The student appeared happy when he did his oral presentation and the Father agreed that the student felt positive about himself. Although the student was happy about how he had done, the Father was not. (Testimony, Father, Testimony, Cooper, Testimony, Barry)
60. The student began attending Eagle Hill School at the beginning of the 2001-2002 school year. The program that he attends at Eagle Hill is not a special education program approved by the Connecticut State Department of Education. It is the Parents' understanding that only students with disabilities attend Eagle Hill. No witnesses from Eagle Hill testified and there was no reason given as to why no Eagle Hill witnesses testified. No evidence was submitted as to the special education and/or related services, if any, that the student receives at Eagle Hill. The Parents did not know whether his teachers were certified special education teachers or whether he received speech and language services. He does not have an IEP and the Parents have not observed the program. He continues to see his friends from Greens Farms School. (Testimony, Mother, Testimony, Father)
61. Dr. Sherrill Werblood, licensed clinical psychologist, was called as a witness by the Parents. She is a licensed clinical psychologist, and is certified as a school psychologist and was formerly a Director of Special Education in another school district, and was certified as a school administrator. She testified that as of the date of her testimony that she had been the student's therapist for almost one year. (Testimony, Werblood)

62. The student was very resistant about moving to Eagle Hill. He was happy at Greens Farms and did not want to go to Eagle Hill and leave his friends. He told Dr. Werblood that he would hurt himself if he had to go to Eagle Hill. From September through November, the student demonstrated much difficulty in going to Eagle Hill and on Sunday nights would demonstrate behavioral patterns about not wanting to go to school. The student started to brighten somewhat in November although as of early December, the student was still reporting to Dr. Werblood that he was exhibiting difficulty in the mornings going to school. Home-based difficulties regarding schoolwork were significantly diminished. (Testimony, Werblood, Testimony, Mother, Testimony, Father)
63. Dr. Werblood observed the student at Eagle Hill for two hours at some time in November, 2001. She believed that he was learning there. She also observed him during a lunchtime when she saw him as a loner. He ate a bagel and sat by himself. She also was aware of a problem between the student and Mr. Ruggiero, the student's coach and counselor at Eagle Hill, and she spoke with Mr. Ruggiero after her observation to negotiate a resolution of their conflict which she described as a power struggle. Teachers reported to Dr. Werblood that the student showed anxiety and would tend to panic when presented with things that he thought he could not do; although they indicated that this was getting better, it continued to be a concern. In response to a question from the Hearing Officer, Dr. Werblood testified that the student had not demonstrated to her any anxiety about attending Greens Farms and that he was probably comfortable there. When Dr. Werblood observed the student at Eagle Hill, she noted that while the other children were respectful of the student, the student laughed at another child who made a mistake. When this occurred, the teacher did not address it because she did not hear it. The teachers described the student as a child who tended to stay somewhat distant from friendships although they were seeing some progress in this area. (Testimony, Werblood).
64. The Board never had an opportunity to observe the student's program at Eagle Hill. (Exhibits B-73, B-74, B-75, B-76)
65. On November 6, 2001, nearly a month before the first day of hearing, the Board's counsel wrote to Parents' counsel requesting permission for the Board's representatives to observe the student in his placement at Eagle Hill. By letter dated November 9, 2001, Parents' counsel wrote to Board's counsel indicating that "he was not authorized to provide such consent". The Father later testified that the Parents did not give permission for the Board to observe the student because his attorney told him that he did not have to give consent. On November 9, 2001, the Board filed a Motion for Observation and Memorandum in Support ("the Motion for Observation"), seeking permission to observe the student in his placement at Eagle Hill. The Motion for Observation set forth reasonable conditions under which the Board was prepared to conduct the observation in order to accommodate the concerns and/or needs of Eagle Hill. On November 29, 2001, the Hearing Officer granted the Motion for Observation, noting that an objection had been filed and stating that the

“parties are to cooperate in this Order so as not to delay or otherwise change the hearing dates already scheduled”.

66. By letter dated December 3, 2001, Parents’ counsel wrote to the Hearing Officer stating that he had not received the Motion for Observation and therefore could not address the specifics of the Motion, but reserved the right to do so. On the first day of hearing on December 5, 2001, the Hearing Officer treated the Parents’ counsel’s December 3, 2001 letter as a Request for Reconsideration and granted that motion citing the recent problems with the national mail delivery system. On December 5, 2001 at the hearing, Parents’ counsel hand delivered to the Board’s Counsel and the Hearing Officer a Memorandum of Law in Opposition to the Motion for Observation dated December 4, 2001. The parties then presented oral argument on the Motion for Observation. The Motion for Observation and the Motion in Opposition were both considered and the Motion for Observation was granted on December 7, 2001. The observation was relating to whether Eagle Hill is an appropriate placement for the student. (Exhibit B-73)
67. In a letter dated December 7, 2001, the Board sent a letter to Leonard Tavermina, Headmaster, Eagle Hill School seeking to arrange the observation and enclosing a copy of the Order. The letter was signed by Cynthia A. Gilcrest, the Director of Pupil Services for the Board and in every respect it was a proper and reasonable attempt to carry out the hearing officer’s order. (Exhibit B-73)
68. At the hearing of December 11, 2001, Parents’ counsel represented on the record that the Father had spoken to Mr. Ruggiero of Eagle Hill at 9:30 A.M. on December 10, and Mr. Ruggiero gave permission for the Board to observe at Eagle Hill under the same conditions as were imposed on Dr. Werblood, i.e., one observer for the same amount of time. Parents’ counsel further represented that the Father later that day received a call from Eagle Hill withdrawing permission for the Board to observe at Eagle Hill and stated that the Board’s December 7, 2001 letter (B-73) had caused Eagle Hill to reconsider the observation. This explanation was absolutely nonsensical and at that point the Hearing Officer believed that it must be founded on misunderstanding. Seeking to address the misunderstanding, the Hearing Officer asked the Parents’ counsel whether he had spoken to anyone at Eagle Hill. He indicated that he had not, so the Hearing Officer requested that Parent’s counsel try to facilitate cooperation with the Order which he agreed to do. The Hearing Officer stated that if it proved that something about the terms of the observation were in fact problematic, the Hearing Officer would consider amending the terms. (Transcript 12/11/01)
69. In a letter from Mr. Tavermina dated December 11, 2001, Eagle Hill School denied the Board’s request to observe the student stating in total:

“We received your request for a representative to observe one of our students. School policy does not permit observations for this purpose, so we find we must decline your request.” (Exhibit B-76)

70. In his testimony on December 13, 2001, the Father testified regarding his conversations with Eagle Hill staff concerning the observation order. The Father stated that on Monday, December 10, he spoke with Mr. Ruggiero of Eagle Hill to initiate the same process that had been initiated for Dr. Werblood's observation. Although it "seemed" to the Father that "it would be boilerplate", at no time did Mr. Ruggiero or anyone else at Eagle Hill state that permission was granted for the observation. In a second phone call that day, Mr. Ruggiero told the Father that the decision regarding the observation was "out of his hands" and would have to go through "proper legal channels". He then called back and told the Father that the observation would not be permitted, that the Father should take up the matter with Mr. Tavormina, and that Mr. Tavormina was "tight lipped about these things". Although there could be a number of explanations as to why, this was significantly different than what had been represented at the hearing two days earlier. (Testimony, Father)
71. The Father stated that he did speak with Mr. Tavormina thereafter and Mr. Tavormina said that he would not reconsider this decision, that Eagle Hill would not comply with the Hearing Officer's order, and that they did not permit observations "for anyone". The Father testified that he did not tell Mr. Tavormina about Dr. Werblood's evaluation. (Testimony, Father, Transcript, December 13, 2001, p.153 – 154)
72. Counsel for the Parents wrote Eagle Hill School on December 13, 2001 and requested the school's director to reconsider his December 11, 2001 decision. (Transcript, January 28, 2002)
73. At the hearing of December 7, 2001, the Parents presented as a witness Dr. Sherrill Werblood. During the course of her direct testimony, Dr. Werblood began to testify regarding an observation she had made of the student at Eagle Hill. The Board's objection to this testimony was overruled. Subsequently, on January 24, 2002, the Board filed a Motion to Strike the Testimony of Dr. Werblood as to her observation of the student at Eagle Hill. At the hearing of January 28, 2002, it was agreed that the Motion to Strike would be addressed at the February 1, 2002 hearing. (Transcript, December 7, 2001 and January 28, 2002)
74. On December 26, 2002, the Board submitted as Exhibits B-77 and B-78 two letters, one from Attorney Mary Gelfman to the State Department of Education dated December 4, 2001 and, a letter in response from George Dowaliby at the State Department of Education dated December 13, 2001, both addressing the question of Eagle Hill's failure to permit observations and the extent that the State Department of Education had the authority to address this issue. The Parents objected to these exhibits on the grounds of relevancy and hearsay. At the January 28, 2002 hearing, the Hearing Officer stated that she would take administrative notice of B-77 and B-78, which were then admitted as hearing officer exhibits HO-2 and HO-3,¹. The

¹ Since these exhibits were not admitted as Board exhibits, the numbering of the Board exhibits reflects that B-77 and B-78 were intentionally omitted.

Hearing Officer explained that at a recent training meeting of the due process hearing officers, she, along with the other hearing officers, was made aware of a two-tiered arrangement at Eagle Hill where part of the school was approved by the State Department of Education and part was not approved. She inquired of Parents' counsel whether the student was attending the approved or the non-approved portion of Eagle Hill. The Parents had not asked which portion of the school the student was attending, although Parents' counsel represented that the assumption was that he was in the approved special education program. The Hearing Officer indicated that it was important to know, not assume, what slot the student was in since, if the student was in one of the fifteen approved slots, the State Department of Education would support the enforcement of the observation order; however, they would not do so if the student was not enrolled in one of the approved slots. (Transcript, January 28, 2002)

75. At the January 28, 2002 hearing, the Hearing Officer also inquired whether there had been any movement on the issue of the observation at Eagle Hill. Counsel for the Parents reported back that the position of Eagle Hill was unchanged. Board's counsel requested a copy of the letter to Eagle Hill and the Parents' counsel refused. Although the Hearing Officer was surprised and perplexed as to why Parents' counsel would not provide a copy of that letter, given it was written at her request in the course of the hearing, she did not order its production. Parents' counsel indicated that there was information in his letter to Eagle Hill that he did not wish to have as an exhibit in this proceeding. The hearing officer expressed concern that Eagle Hill had not provided any reasonable explanation for their refusal to comply with the order and that it was not a "level playing field" at this time. (Transcript, December 13, 2001 and January 28, 2002)
76. It was agreed that the Board's Motion to Strike would be deferred pending the outcome of the information as to whether or not the student attended an approved program at Eagle Hill since, if he did, the State Department of Education would have authority to enforce the observation, thereby mooting the Motion to Strike. (Transcript, January 28, 2002)
77. By memo dated January 30, 2002 to the Hearing Officer, Parents' counsel produced a copy of a two-sentence letter to him from Eagle Hill which purportedly dealt with the question of whether the student was enrolled in an approved or non-approved slot at Eagle Hill. That letter from Leonard Tavormina of Eagle Hill read in total:

“[Mr. and Mrs. B’s] assumption as you expressed it in your last correspondence is not correct. [the student] was privately enrolled at Eagle Hill-Southport.”

Parents' counsel, in his January 30 memo, stated that the letter from Eagle Hill was ambiguous, but that it appeared that the student had not been placed in one of the fifteen slots approved by the State Department of Education. (Exhibits P-6, P-7)

78. This issue was addressed at the next hearing date on February 1, 2002. At that time, in the course of a discussion on the record of this issue, the Hearing Officer suggested that the question of whether the student was or was not in a special education approved program at Eagle Hill would be resolved with a stipulation from Parents' Counsel that the student was not placed in a program at Eagle Hill that was approved by the State Department of Education. Parents' counsel would not agree to such a stipulation. After much discussion and debate, Parents' counsel agreed to provide a copy of his letter to Eagle Hill dated January 28, 2002. (Exhibit P-5, Transcript, February, 2002)
79. Although Parents' counsel refused to stipulate that the student was not in an approved special education placement at Eagle Hill, the Hearing Officer stated for the record that she was finding that the student was in an unapproved program. (Transcript, February 1, 2002, p 22-23)
80. At the hearing of February 1, 2002, the Hearing Officer denied the Board's Motion to Strike, ruling that the Board's arguments on the issue of Dr. Werblood's testimony would go to the weight her testimony would be given rather than the admissibility. (Transcript, February 1, 2002)

CONCLUSIONS OF LAW:

1. There is no dispute that the student is entitled to special education and related services as a student identified with a specific learning disability and thereby entitled to receive a free and appropriate public education ("FAPE") pursuant to 20 U.S.C. Section 1400 et. seq., the Individuals with Disabilities Education Act ("IDEA", also "the Act"), 34 C.F.R Section 300.7(a) and Section 10-76a-1(d) of the Regulations of Connecticut State Agencies (RCSA).
2. The Act defines FAPE as special education and related services which:
 - “(A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized education program required under Sec. 614(d).” 20 U.S.C. Section 1401(8).
3. Connecticut Regulations provide that “the public agency has the burden of proving the appropriateness of the child’s program or placement or of the program or placement proposed by the public agency.” Conn. Reg. 10-67h-14. While these regulations became effective July 1, 2000, they were enacted to bring Connecticut

law into compliance with well-established federal law. “[c]omplaints are resolved through an “impartial due process hearing,” 20 U.S.C. Section 1415(b)(2), at which school authorities have the burden of supporting the proposed IEP, *see Matter of the Application of a Handicapped Child*, 22 Educ. Dep’t Rep. 487, 489 (1983)(“It is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board].”). *Walczak v Florida Union Free School District*, 142 F. 3d 119 (2d Cir. 1998)

4. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al. v. Rowley*, 458 U.S. 176 (1982), 102 S.Ct.3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.
5. Both parties were represented by counsel from the beginning of this case. In the statement of issues agreed to by the parties at the prehearing conference in which both counsel participated, and confirmed at the beginning of each parties’ post hearing briefs filed by counsel, no procedural concerns were placed in issue in this matter and therefore none are addressed in this decision.
6. As to the second prong of the Rowley two-part test, it must be determined whether the 2001-02 IEP was reasonably calculated to confer meaningful education benefit upon the student. *Rowley* 458 U.S. at 192, 102 S. Ct. at 3043-44. While the law does *not* require that a school district provide an educational program to *maximize* a student’s educational potential (*Rowley* at 3046), the school district must provide more than “mere trivial advancement.” *Mrs. B. v. Milford Board of Education* 103 F.2d1114 (2d Cir. 1997).
7. IDEA requires that the relevant public education authority to prepare and review at least annually an "individualized education program" (IEP) for each child with a disability. 20 U.S. 1414 (d)(4); 34 C.F.R. 300.343. The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* U.S.C. 1414(d); 34 C.F.R. 300.345-300.350. A child's IEP describes, among other elements, the child's present levels of educational performance, measurable annual goals for addressing the child's educational needs that result from the child's disability, and the individualized instruction and services that will be provided to help the child. 20 U.S.C. 1414(d)(1)(A); 34 C.F.R. 300.347.
8. Additionally, the IEP must include a statement of the individualized instruction and services (including supplementary aids and services and program supports and modifications for school personnel) that will allow the child to make appropriate progress toward attaining the annual goals of the IEP, "to be involved and progress in the general curriculum" and "to participate in extracurricular and other nonacademic

activities", and "to be educated and participate with other children with disabilities and nondisabled children" in those extracurricular and other nonacademic activities. 20 U.S.C. 1414(d)(1)(A)(iii); 34 C.F.R. 300.347(a)(3)

9. "If personalized instruction is being provided with sufficient support services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free, appropriate public education' as defined by the Act." *Rowley* at 3041. Rather, the individualized education program should be "reasonably calculated to enable the child to receive educational benefits [.]" *Rowley* at 3051. The *Rowley* court interpreted IDEA as requiring no more than a basic floor of opportunity. The goal of IDEA then 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), *citing, Rowley, supra*, at 200-01.
10. In this case, the issue is whether the proposed IEP for the 2001-2002 school year would provide FAPE to this student. The Board teacher to whom the student would have been assigned for fifth grade has excellent credentials. She is highly experienced in working with children that have disabilities similar to that of this student and she testified in a credible manner in admitting that it is important for a teacher to meet a student before forming an opinion about the severity of a student's learning disability. She admitted that she had never met the student, never observed the student, and never taught the student. She did not attend any of the student's PPTs during the 2000-2001 school year. Therefore, her opinion about whether components of the program being offered to the student is appropriate cannot carry the weight of the Board's burden of proof because of her lack of familiarity with the student as an individual. Her opinions were based on what the teachers and other staff who worked with the student communicated to her through discussion and written records and as noted in the findings of fact, a number of these records are inconsistent, contradictory and lacking in reliability.
11. In some regards the Board provided adequate programming and support. The Parents claim that homework assignments remained too difficult and demanding for the student. The record overwhelmingly supports the conclusion that the homework, at least by the fourth grade, had been properly modified for the student. The Board provided a vehicle for communicating with the teachers about homework issues and limiting the burden on the family. To the extent that the family was still experiencing a problem, it was due to their failure to follow through with the supports and modifications initiated by the Board, due to the student manipulating the family or for other reason not within the Board's control. For example, the Board staff wanted the reading done first, but at times when the student insisted on doing math homework first the parent gave in. The Board wanted each subject area limited to twenty minutes, but at times when the student insisted on working longer even though it would lead him to the point of frustration, the Parent allowed it. In regard to homework, the only additional step the Board should have taken was to invite the Parents in and witness for themselves how the student could and did complete his

homework for the Board staff the following day in school. This was a suggestion of Ms. Welsch and it was a good one, but the failure of the third and fourth grade staffs to think of it certainly does not rise to the level of constituting a failure to provide FAPE. The Board has done enough regarding issues of homework.

12. At hearing the Parents claimed that the student was highly anxious throughout at least his third and fourth grade years in the Board's program, and that the PPT did not appropriately address this anxiety. The Hearing Officer concludes differently. The student was anxious at times but both Ms. Barry and Ms. Cooper were particularly credible when testifying that although there was anxiety early in the year, it subsided by approximately October and the student they observed throughout most of the school day and year did not have undue anxiety. This was true in both the regular education and special education settings. In the regular education setting Ms. Barry testified that he really "settled in" once the CMTs were over in early October. In the special education setting, Ms. Cooper testified that she believed that the student "absolutely" felt comfortable in her group, particularly since one of the boys (the one who came from the same classroom), was his best friend.
13. In addition, in regard to anxiety, there is the matter of the student having run for the council representative position early in the year (which required making a short speech to his class), losing, and going on to win after running for the position again midyear. This does demonstrate a significant level of self-esteem and is inconsistent with the level and duration of in-school anxiety the Parents suggest. In their reply brief the Parents claim that the Board attempted to cast aspersions upon the Parents by questioning the extent of the anxiety the Parents were concerned about the student demonstrating if he was comfortable getting up in front of his class at the beginning of the school year, giving a speech and take the risk of losing the election, which in fact he did. To suggest that the student may not have been nearly as anxious in school as he was expressing to adults out of school, does not in any way diminish the sincerity of his parents' concern about him, but rather, for example, the reliability of what a nine year old is relating.
14. Although the Board addressed issues of homework and anxiety adequately, other aspects of the student's 2000-2001 IEP give the impression of a program that was confused and disorganized and this undermines the reliability of the 2001-2002 IEP at issue in this matter, because it is these 2000-2001 materials and assessments that the Board relied upon in formulating the 2001-2002 IEP.
15. When the student began the 2000-2001 school year, he was the lowest overall in his class in both reading comprehension and fluency. He was not the lowest by a little but by a great deal. At the beginning of the fourth grade, the range of independent reading levels of the students in his class went from the beginning of second grade to the sixth grade level. Without this student in the class, the range would have been from the beginning of third grade to the sixth grade level. This was the testimony not of a Parent witness but of the regular education teacher. She further testified that if the other students were asked who needed the most help from the aide, the fourth

grade children themselves could have identified this student as the most in need. And yet at the annual PPT meeting on November 14, 2000, the student's overall time in special education and related services was decreased. Further, an accommodation (the use of a tape recorder and books on tape) which could have been helpful but had never been implemented, was eliminated without any adequate explanation.

16. Then, in January 2001, the special education teacher gives the student a report that is good in regard to all areas of the language arts curriculum except for spelling. Yet the very next month (and less than three months after his special education hours had been decreased), the PPT is increasing his hours in special education and the team is deciding that the special education teacher should "take over" the language arts program. When questioned as to what the reason for this change was, the special education teacher testified that, as the year went on, the books became more difficult and she felt the student needed her assistance and the increase in service hours.
17. The fourth grade staff testified that they felt that the Parents' frequent inquiries as to when their son might be expected to close or narrow the "gap" were inappropriate. The staffs' obvious reluctance to evaluate the student using any type of standardized tool that might give the Parents a more objective measure than teacher reports of their son's progress is particularly troubling. In the fourth grade this student was the slowest reader in his class and he had an IEP with goals that included reading second grade level sentences and demonstrating improved spelling skills related to second grade curriculum. The Parents were reasonably concerned that he would not be adequately prepared for the fifth grade. When the Board finally relented, they used an assessment tool that is not nationally normed. These are Parents who were supportive of the Board's personnel and program until the third grade. They are Parents who did not typically question any of the goals or objectives but rather deferred in most regards to the judgment of the Board staff. It was only when they requested experienced staff for the third grade and their son was instead assigned both regular and special education teachers that were relatively new and inexperienced, and they saw their son begin to slip, that they began to lose faith in the Board's program. They may not have used the correct words to express their concerns when they referred to "closing the gap", but the meaning should have been clear especially because, at least to a noneducator, this sounds very similar to problems the educators were trying to address in February 2001 by recommending that the special education teacher take over the student's language arts program and increase his hours because the books were getting harder.
18. Then, in May 2001 the Board reported that the student was reading below grade level, at approximately third grade level at the May 16, 2001 PPT and less than a month later were reporting that the student was reading at Level 3- Instructional with 95% correct and Level 4-instructional with 75% correct, per a Woods and Moe reevaluation. (Exhibit B-72)
19. The Board has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency. The

credibility and reliability of the Board's witnesses and documentation as to the fourth grade language arts portion of the IEP, including the reports of progress toward goals and objectives as well as the appropriateness of the goals and objectives themselves, is undermined by the contradictory reporting and changes in the programming. This reporting, both written and oral, were relied on in drafting the 2001-2002 program and it is, therefore, concluded that the Board did not prove the appropriateness of the program it offered for the 2001-2002 year in regard to the language arts goals and objectives.

20. Ms. Welsch appeared to have the credentials, expertise and motivation to implement a program that would provide educational benefit to this student in all areas of his IEP, including the language arts portions. However, because she had never observed or evaluated the student she relied on this flawed reporting in formulating her opinions about what an appropriate program would be for this student. She testified that it is important to meet a student before formulating an opinion about the severity of their disability and this is certainly even more the case if the information provided is unreliable.
21. It is well established that an educational program provided to a special education child under IDEA must be in the least restrictive environment possible. 20 U.S.C. 1412(a)(5)(A), 34 C.F.R. 300/550(b). The *Rowley* Court noted in the course of its opinion that the IDEA contains a separate specific legal mandate which "requires participating states to educate handicapped children with nonhandicapped children whenever possible."
22. School districts must carefully examine the educational benefits, both academic and nonacademic, available to a child with a disability in a regular classroom. Among the factors to be considered are the advantages derived from modeling the behavior and language of children without disabilities; the effects of such inclusion upon the other children in the class, both positive and negative; and the cost of necessary supplementary services. See *Oberti v. Board of Education*, 995 F.2d at 1216-17; *Holland*, 14 F.3d at 1401; *Greer*, 950 F.2d at 697; *Barnett v. Fairfax County School Board*, 917 F.2d 146, 153-54 (4th Cir.), cert. denied, 112 S.Ct. 175 (1991); *Daniel R.R.*, 874 F.2d at 1048-50; *Mavis*, 839 F.Supp. at 983, 990.
23. The courts have recognized that a child's academic performance may be positively affected by the nonacademic benefits of mainstreaming. A child may be better able to learn academic subjects because of improved self-esteem, behavior and increased motivation due to placement in regular education and modeling behaviors. *Holland*, 786 F.Supp. 874-79.
24. In the Board's program the student was on grade level in science and social studies. He had many friends and he did not want to go to Eagle Hill. His therapist spent a good deal of time working with him on accepting the change of school. Once at Eagle Hill he wanted to come back and he retains friends from the Board's school. He had opportunities for specials such as art in the Board's school. He benefits from

being with nondisabled peers because he is well-liked and very social so he is afforded many opportunities for modeling in the regular education setting.

25. In placing the student at Eagle Hill the Parents made a unilateral placement. “Parents who unilaterally change their child’s educational placement without...the consent of school officials, do so at their own financial risk.” *Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). “[W]hether the parents of a disabled child are entitled to reimbursement for the costs of a private school turns on two distinct questions: first, whether the challenged IEP was adequate to provide the child with a free appropriate public education; and second, whether the private educational services obtained by the parents were appropriate to the child’s needs. ...Only if a court determines that a challenged IEP was inadequate should it proceed to the second question.” *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed.*, 226 F.3d 60, 66 (2d Cir. 2000)
26. Having concluded that the Board failed to provide FAPE, the second part of the analysis shifts the burden to the parents to prove that the placement they selected is appropriate. *Sch. Comm. of Town of Burlington v. Dept. of Educ. Mass.*, 471 U.S. 359, 370 (1985); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *S. ex rel. S. S. v. Board of Educ. of the City School Dist. Of the City of Yonkers*, 231 F. 3d 96, 104 (2d Cir. 2000)
27. There is a overwhelming lack of evidence in the record that Eagle Hill is an appropriate placement for this student.
28. It is clear that the program is not one which is a special education program approved by the State Department of Education.
29. Other than the names of the classes that the student takes, and Dr. Werblood’s testimony, which is given little weight in regard to her observation at Eagle Hill, there is no evidence whatsoever in the record as to what constitutes the student’s program at Eagle Hill; how it is delivered; the ages, skill levels and disabilities of the students with whom he is grouped; the certifications and experience of any of the individuals providing services to him; whether he is receiving any related services including counseling and speech and language services; the types of materials, methodologies and strategies that are being implemented for him; or the extent to which, if any, he accesses the computer or software. No IEP was produced, and in fact it appears that Eagle Hill has no IEP in place for the student. The Parents produced no witnesses from Eagle Hill at all and therefore there is no evidence in the record from those individuals who are delivering the student’s program or have direct knowledge about it. In the absence of such evidence, there is no basis upon which the hearing officer can conclude that Eagle Hill is appropriate for the student. The exhibits submitted by the Parents of the Eagle Hill reports are virtually meaningless in the way that they are drafted when presented without informed testimony. There is no way of knowing what the three criteria (“consistently”, “with some encouragement” and “with direct

support”) mean as to the student or how the various skills are measured and the reliability of these measures without knowing the credentials of those persons entering the measurements. Although the Parent had the opportunity to produce witnesses to explain these exhibits, either voluntarily or through subpoena, the Parents failed to do so. The Parents have failed to carry their burden of proof.

30. The record is totally lacking in terms of any meaningful evidence as to how the student is actually performing educationally at Eagle Hill. While it is clear that the Parents believe that after three months at Eagle Hill, with the student not wanting to be there, the student is suddenly reading at a level that is acceptable to the Parents (testimony, Father), no witness has provided any testimony whatsoever as to the student’s level of performance within the classroom. The Parents have never observed the student’s program. Dr. Werblood observed for two hours in November and was of the opinion that the student was learning; however, there was no testimony as to how much he was learning and the type of learning that was occurring. In any event, one would expect that the student would continue to learn at some level, as he done at all times while in the Westport Public Schools. However, the picture painted by Dr. Werblood of the student’s experience at Eagle Hill was, as she said, far from perfect. The student experienced a protracted three month period of behavioral difficulties in transitioning to Eagle Hill. The student’s teachers reported that he demonstrated anxiety and being overwhelmed when presented with new materials. There was no evidence as to how that issue was being addressed at Eagle Hill. In addition, and perhaps the most distressing of all, was the fact that the student, who was happy, very social and very popular at Greens Farms, was seen as a singleton and a loner by Dr. Werblood based upon her observation at Eagle Hill. Dr. Werblood testified that the Eagle Hill teachers also saw the student as having difficulty making friends. One of his greatest strengths in the public school environment, i.e., his social skills, has somehow been converted to a liability for him in the population of all disabled students.
31. Related to this second issue is the fact that the Board was denied the opportunity to observe the student at Eagle Hill. Although the Parents seem to take the position that they were at all times cooperative in facilitating the hearing officer’s order and seeking the observation, such a conclusion is unsupported by the record. Had the Parents truly been cooperative, they would have consented to the observation at the time of the Board’s request in November and had the observation scheduled as they had scheduled the observation of Dr. Werblood. The Parents offered no legitimate explanation as to why they would not cooperate initially with the evaluation. Instead, the Board was forced to seek the hearing officer’s intervention and a great deal of due process time was spent on this and this should have been unnecessary. It was stunning to learn that Eagle Hill, a school that teaches students with disabilities, would not cooperate with the federal and state due process system set in place to protect these very children. One must wonder what it was that the Parents and Eagle Hill were seeking to withhold since, even after the hearing officer’s order, the opportunity to observe was not permitted.

32. For all of the above reasons, it is clear that the Parents have failed to carry their burden of proof that Eagle Hill is an appropriate program for the student for the 2001-2002 school year.

FINAL DECISION AND ORDER:

1. The program offered by the Board for the student for the 2001-2002 school year did not provide FAPE and was not appropriate in regard to the language arts goals and objectives and programming.
2. There is insufficient evidence to conclude that the Eagle Hill School provided the student with an appropriate program for the 2001-2002 school year.
3. The Board is not financially responsible for the costs of the placement at Eagle Hill for the student for the 2001-2002 school year.