

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Granby Board of Education

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Appearing before: Attorney Christine B. Spak  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Has the Granby Board of Education [hereinafter, the Board] provided appropriate evaluations of the Student?
2. Has the Board developed and implemented an appropriate program for the 2001-2002 and 2002-2003 school years?
3. Did the Board offer appropriate summer services at the end of the 2002 school year?
4. If not, is the Board responsible for reimbursement of evaluations submitted by the parent, reimbursement of the consultant brought to the PPT by the parent, tutoring costs for the summer of 2002, tuition and transportation costs for the private reading and spelling program for 2002-2003 and/or the consultants' fees for 2002-2003?

**SUMMARY:**

The Student was in first grade when in April 2001 his parents requested that he be evaluated for developmental delays and learning disabilities due to difficulties with reading, spelling and writing. The Board convened a PPT and the parties did not agree on the evaluation or the services to be provided. The parent retained an independent evaluator who determined that the Student had a specific learning disability. The Board then conducted their own evaluation and in December of 2001 identified the Student as

eligible for special education services for reason of a specific learning disability. The parties continued to have disputes about the nature and intensity of the services to be provided and in September of 2002 the parents requested a due process hearing.

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).

### **FINDINGS OF FACT:**

1. The Student was born on August 16, 1993 and was nine years old at the commencement of this hearing. B-2. He has been enrolled in the Granby public schools since beginning kindergarten and will enter the fourth grade in the 2003-2004 school year. P-60. He has no siblings and he was seven years old when he entered first grade. Testimony of Mother.
2. The parties agree that the Student is a well-behaved child. The Student was finding first grade hard and the Mother brought this up at the November parent-teacher conference and was told not to worry, that all children learn to read. The Mother testified that only later did she learn the the Student's first grade teacher, Nancy Shyer, had in fact placed him on a watch list for reading difficulties in the late fall. Testimony of Mother
3. Ms. Shyer testified that she first became concerned about the Student's reading in January 2001 and it was then that she shared these concerns with the Ms. Roy, the head of the Early Reading Intervention program [hereinafter ERI program]; at least by this point it is agreed that the Student was placed on a "watch list." The March Progress Report documented ultimate success with an independent writing task, but it also noted a hesitancy with reading and writing. At this point Ms. Shyer believed he could use some additional assistance with his reading, and she referred him to the ERI program. B-7, Testimony of N. Shyer.
4. The ERI program is a regular education intervention that is only available to first grade students. The head of the program in Ms. Roy and her assistant is Ms. Zeiner. Ms. Zeiner was not trained in Lindamood-Bell. Testimony of N. Shyer; Testimony of T. DiCorleto.
5. The parents contend that the ERI program was suppose to be a five day a week program and that the reason that their son never received five days and wasn't begun in it earlier was because there was no room and they had to wait until another student was exited before their son could attend. They further contend that when the Student began in the ERI program on March 23, 2001 there was only space three days a week rather than five. Neither Ms. Roy, the head of the ERI program, or Tracy E. Zeiner, the Student's instructor in the ERI program, testified. Once begun in the ERI

program the Student was suppose to get three one-half hour sessions a week. The June 2001 End of the Year Reading Evaluation authored by Tracy E. Zeiner indicates that he received this level of service. B-17 The Mother disputed the claim that the Student received the three weekly sessions and the school/home ERI journal which was completed by both Ms. Zeiner and the Mother demonstrates that he did not get the number of sessions reported by Ms. Zeiner. In particular, in the first month he received significantly fewer than the three sessions a week that he was suppose to get and the frequency of the sessions increased only after the April PPT requested by the parents. There is no reliable evidence that the ERI program was provided with the frequency or consistency that it was originally intended. Testimony of the Mother, B-17, P-30, P-3.

6. The first grade teacher referred the Student to summer school for help with reading. She is allowed to recommend three students each year out of the approximately twenty-one in her class. Testimony of Shyer.
7. On April 9, 2001 the parents requested a PPT to evaluate their son for developmental delays and learning disabilities. B-8.
8. The Board convened a Child Study Team regarding the Student in April 2001. It is the practice of this Board that even if it is the parent who brings a concern to a teacher which results in a Child Study Team reviewing the concern, the parent is only informed of the Child Study Team at the teacher's discretion. In this case the parents were "probably not" informed. Testimony of Sullivan, testimony of Mother as a whole.
9. The initial Planning and Placement Team ["PPT"] meeting was held on April 24, 2001. B-10.
10. Prior to the April 24, 2001 meeting, Thomas Bianca, a Board special education teacher, reviewed the Student's work samples and observed him in class when he was there for other duties. He did not conduct his normal informal assessment which would have consisted of activities like addition and subtraction and following directions because he was under the belief that the parents would not allow the Student to be pulled from the classroom for assessment purposes. Mr. Bianca could not remember why he believed that, but thought it might have come from the classroom teacher, Ms. Shyer. Mr. Bianca also thought the parents wanted a formal evaluation to the exclusion of any level of informal assessment but he could not answer why he thought that or who told him that. He denied that it was the classroom teacher. At one point he further claimed that the parents' letter dated May 2, 2001, B-13, prevented the Board from completing any evaluations of the Student at the PPT. However, it is noted by the Hearing Officer that the parents' letter was written approximately one week after the April 24, 2001 PPT meeting. Testimony of Thomas Bianca
11. The conclusion that the parents were preventing assessments prior to the PPT does not bear out under the weight of the evidence. The parents are the ones who requested the PPT, who requested evaluation for a learning disability or a developmental delay and it was the parents who were repeatedly expressing concern about their son, at least since the November parent/teacher conference. Testimony of Mr. Bianca, testimony of Mother, B-10.

12. Based upon his review and observation, Mr. Bianca did not believe that the Student was exhibiting the signs that children with significant learning disabilities generally display, but felt that the Student was performing as could be expected of most first graders. Although he had never formally assessed or even formally observed the Student, his reasons for this were based on the work samples, classroom performance noticed in the course of other duties, an absence of a family history of learning/reading disabilities, and from talking to Ms. Shyer, the classroom teacher. Testimony of Mr. Bianca.
13. Ms. Shyer testified that during a March parent teacher conference the Mother did express concern about pulling the Student from the classroom for ERI but then agreed before the end of that very conference to allow it. Ms. Shyer believed that in the March-April 2001 period the Student was not as strong a reader as she would have liked but he was still within the spectrum of first grade development, and that in respect to his peers, reading levels for first graders were constantly changing. She had conducted no formal assessments of the Student's reading ability. Testimony of Ms. Shyer
14. At the April 24, 2001 PPT meeting, Ms. Shyer and Mr. Bianca shared with the Team some of the Student's recent work samples and reviewed his classroom functioning. The Team noted that although his progress in the areas of reading and written language had been slower to develop, they concluded that his overall academic skills were still developing appropriately. Given that reading and writing are the core of what is taught in first grade this assessment by the Team is not very meaningful and is not credible. B-10.
15. The Board determined that there was insufficient evidence establishing the need for a full evaluation of the Student and the Parents' request for an evaluation was denied. B-10.
16. The Board asserts that it had qualified its April 24<sup>th</sup> decision not to evaluate by inserting into the PPT record the phrase "at this time," to signify that it would reconsider the parents' evaluation request during the 2001-02 school year. The Board testified that the minutes of that PPT meeting were accurate. Nevertheless the PPT minutes do not reflect the Board's contention in regard to a Fall, 2001 evaluation. It is noted that the Board had inserted "N/A" indicating not applicable, in the section projecting the next PPT date for the Student. B-10, Testimony of Dr. Sullivan.
17. The Board had recommended the continuation of the ERI program at the April 24, 2001 PPT. In addition, the Board had recommended that the Student attend a summer reading intervention program during the summer following first grade. The PPT's rationale for those recommendations was to see what the ERI program would do and also see what summer school would do, and then the Team would "be in a position in the [F]all to see whether in fact formalized, individualized assessments [were] necessary." The Team believed that a month was an insufficient period of time in which to assess whether an intervention such as the ERI program had been successful. In fact, Thomas F. DiCorleto, the Board's Director of Special Services, testified that "it would be extremely unusual that a child would show any appreciable gain in a month." Testimony of Mr. DiCorleto, testimony of Dr. Sullivan.

18. The Parents had requested 1:1 reading instruction throughout the entire summer. The Board testified that it only had group reading instruction available three days per week for a period of four weeks. Testimony of Ms. Camp.
19. Ms. Camp, the Principal of the Student's school, presented strong and credible testimony that small group instruction can be more helpful to a struggling reader than 1:1. She testified that small group instruction, as opposed to 1:1, enables a Student to learn from the advice of other students; learn while following along as other students read; learn from other students' mistakes; have some down time to think, reflect and escape; and often get a boost to their self-esteem by being with other students who are at their level. Testimony of Ms. Camp
20. The Parents informed the Board that they would secure the services of a private tutor, a certified teacher, to assist the Student each day with reading throughout the summer. Testimony of Mother.
21. On May 10, 2001 Ms. Shyer wrote the Mother a note indicating that the Student was an "early 2 level" reader. B-28
22. On May 17, 2001 Ms. Shyer wrote the Mother a note indicating that first graders fall into one of seven reading levels as follows: Emergent, Early 1, Early 2, Early 3, Early 4, Fluent White and Fluent Blue. The Student was between and Early 2 and Early 3 level at that point. B-29.
23. On June 22, 2001 the parent was informed that the Student was one of sixty one (61) first grade students out of 172 students who could not read an end of first grade or beginning level second grade book entitled *Frog and Toad*. P-33
24. And yet, in the Student's June 2001 Progress Report Ms. Shyer indicated that the Student was "...leaving first grade as a strong early reader. Although he is still primarily a phonetic reader." In addition, the teacher reported that the Student was able to read "...mid to late first grade books with 98% accuracy." B-18.
25. Although Ms. Zeiner did not testify, her June 8, 2001 assessment was entered into evidence. Four assessment materials were used with the following results: 75% accuracy on First Grade Level site word recognition with low automaticity; 96% accuracy and 100% comprehension on the Developmental Reading Assessment; and average score on the Clay Observation Survey Battery, Hearing and Recording Sounds and 90-100% accuracy on the four parts of the Kearns Informal Decoding Assessment. B-17.
26. In early Summer 2001, the parents retained Miriam Cherkes-Julkowski to evaluate the Student. Dr. Cherkes-Julkowski determined that the Student had a learning disability. Dr. Cherkes-Julkowski did not observe the Student in class or contact his teachers as part of her evaluation. Also, she tested him to the point of fatigue and it was not convincing that breaks would completely ameliorate the impact of such fatigue on a young child undergoing extensive testing. Dr. Cherkes-Julkowski acknowledged that the WISC is almost universally administered in intelligence testing; she elected, however, not to administer it. Rather, she administered the Raven, which uses norms from 1986, fifteen years prior to the Student's June 13, 2001 evaluation. Testimony of M. Cherkes-Julkowski. The WISC-III employs more recent norms than the Raven. Testimony of Mr. DiCorleto. Additionally, the Raven does not test verbal intelligence; it is completely non-verbal. Testimony of Dr. Sullivan.

27. The parents provided a copy of Dr. Cherkes-Julkowski's evaluation report dated June 13, 2001, to the Board in a letter dated July 5, 2001. In that letter, the Parents had requested the Board to provide the Student with appropriate instruction commencing August 30, 2001 per the findings and recommendations set forth in that report and reimburse them for their evaluation costs. B-20.
28. In response to the parents' July 5, 2001 letter, Dr. Sullivan completed a special education referral form and indicated that the Board would require additional information regarding the Student's cognitive, academic, and speech/language skills in order to determine eligibility and programming. B-22.
29. On August 30, 2003 the Board scheduled a PPT meeting on September 6, 2001 in order to review the evaluation report from Dr. Cherkes-Julkowski and to determine the Student's eligibility for special education. B-23.
30. The parents objected to the extensive testing that the Board had proposed at the September 6<sup>th</sup> PPT meeting, based upon the belief that much of the testing was unnecessary and duplicative of the June, 2001 evaluation completed by Dr. Cherkes-Julkowski, and wanting time to review the proposed testing with their evaluator. B-25, B-27; Testimony of Mother.
31. The parents objected to the proposed program of regular education instruction and supports recommended by the Board at the September 6<sup>th</sup> PPT meeting as inadequate for the Student's previously identified needs. B-25.
32. The parents requested that the Board reimburse all of their educational and evaluation expenses incurred to date, as outlined in their August 31, 2001 letter to the Board. B-24, B-25.
33. In a letter dated September 17, 2001, the parents requested the Board to reconsider the extent of testing that it had requested and limit the evaluation to the five areas outlined in their letter. B-29. The Board responded with another proposal in its letter to the parents dated September 18, 2001, pointing out that the eleven days that had elapsed since the PPT would make it unlikely to complete the evaluation prior to the October 5, 2001 PPT. B-30.
34. The Board convened a PPT meeting on October 19, 2001 to discuss the evaluation request and it had agreed to a reduction of the testing originally requested. B-33. The parents provided consent to the Board to evaluate the Student as the outcome of that PPT meeting. B-34.
35. The Student's second-grade teacher was Susan Bush, whom the Student's mother considered "a very able teacher." In fact, on April 8, 2001, she specifically requested Mrs. Bush, writing Mrs. Camp, the Kearns School Principal: "Placing [the Student] with 'the right' teachers will be centrally important. He needs to be in Mrs. Bush's class for Grade 2. Please confirm that this assignment will be made." Additionally, on August 16, 2001 the Student's mother sent a copy of Dr. Cherkes-Julkowski's June 13, 2001 evaluation report to Mrs. Bush, with a cover memorandum that said in part: "We have heard many great things about Mrs. Bush!" Testimony of Mother, B-8, P-34.
36. On various occasions during Fall 2001, Mrs. Bush attempted to persuade the Student's parents to agree to the interim services that the PPT had offered on September 6, 2001, telling them that Mrs. Cohen's reading program would help the Student become a better and more fluent reader. She reiterated this on the Student's

November 2001 Progress Report, writing: Although [the Student] has not yet attained fluency in his oral reading, understanding of the phonetic code is a strength. [The Student] has limited sight vocabulary and therefore must sound out most words on a page of text. I feel it would be very beneficial for [the Student] to receive reading support from our reading specialist on a daily basis. This would help strengthen his skills, expanding his sight vocabulary, give him additional reading time in a smaller group setting and help him increase his confidence. Testimony of Ms. Bush, B-59

37. The Student's Mother, however, told Mrs. Bush that the Board "really didn't know how to teach reading," and in November 2001 the parents still refused to permit anyone outside of his classroom teacher work with him. Testimony of Ms. Bush.
38. The Board proceeded to complete its T.E.A.M. evaluation of the Student during October and November, 2001. B-35 to B-38.
39. The Board provided the parent with a copy of its evaluation report, entitled "T.E.A.M. Review," shortly after the December 3, 2001 receipt date stamped on the cover page. B-42; Testimony of Parent.
40. Board personnel including a school psychologist, classroom teachers, special education teachers, and related service providers provided information that comprised the T.E.A.M. report. Information from the parents was also included in the report. It had been obtained through a telephone interview. B-42.
41. The T.E.A.M. report established that the Student had a specific learning disability and that he was eligible for special education and related services. B-42.
42. Based upon its findings, the T.E.A.M. report made a series of recommendations for the Student. B-42.
43. The December 7<sup>th</sup> PPT determined that the Student was eligible for special education and related services as a Student with a specific learning disability. The PPT then proceeded to develop an IEP for the Student for the balance of the 2001-02 school year, which the parents accepted on December 7, 2001. B-43, B-44.
44. Dr. Cherkes-Julkowski attended the PPT with the parents although she had to leave before the end. Both the independent evaluation and the Board evaluation found that the Student had a learning disability but there were some points of disagreement. The Board disagreed with Dr. Cherkes-Julkowski's assertion that the Student's deficit was primarily in the area of phonological processing, an auditory skill. Rather, the Board's TEAM evaluation determined that the Student's primary deficit was in visual memory, specifically being able to rapidly retrieve sight words, which impacted his fluency. The Board evaluation found some phonological weakness but did not feel it was not as significant a disability of his as was identified by Dr. Cherkes-Julkowski.
45. From approximately December 12, 2001 through the end of the 2001-2002 school year, Judith Cohen provided 2.5 hours per week of reading instruction to the Student, two hours of which was in a group setting and thirty minutes of which was one-on-one. Dr. Cherkes-Julkowski testified that she believed Ms. Cohen 'had a good handle on the ideas' with respect to the Student's reading instruction. Testimony of Ms. Cohen, Testimony of Dr. Cherkes-Julkowski.
46. The parents sent the Board a letter dated January 3, 2002 requesting modifications in five overall areas of the Student's IEP. By this time they had already retained counsel. They did not object to the clear statement in the December PPT minutes which

- indicated that they had accepted the IEP. Also, they did not request another PPT, although they were informed that they could do so. B-47, B-48.
47. The Board responded at length to the parents' January 3, 2002 letter in an undated letter that was date-stamped January 15, 2002 but they did not convene a PPT because the Mother had not requested one. B-48. The Board testified that it was not surprised to receive the parents' letter. Testimony of Dr. Sullivan
48. On April 23, 2002 three Board members sent the parents a letter indicating that since January, 2002 there had been "... a significant trend of inconsistencies and selectivity in the completion of homework assignments by [the Student]." This letter was signed by Thomas Bianca, the Learning Disabilities Teacher/Program Coordinator, Susan Bush, the Second Grade Classroom Teacher and Judith Cohen, the Reading Consultant. B-50.
49. The parents responded on April 26, 2002 asking the following questions:
- 1) Why did it take 4 months for Mrs. Bush, Mrs. Cohen and/or Mr. Bianca to notify us about problems related to homework?
  - 2) Why did Mrs. Bush fail to cite the alleged problems in her March Progress Report?
  - 3) Why did Mr. Bianca fail to cite the alleged problems in his March Progress report?
  - 4) Why did Mrs. Cohen indicate in her March Progress Report that [the Student] returns homework promptly and consistently? Should we believe Mrs. Cohen's official report from March or her contradictory claim expressed in the April 23 epistle?
  - 5) Why did Mrs. Bush, Mrs. Cohen and Mr. Bianca fail to mention alleged homework problems during their joint, face-to-face conference with us in March?
  - 6) Finally, if homework assignments were NOT completed, could [the Student] have advanced as significantly as Mrs. Bush, Mrs. Cohen and Mr. Bianca report in [the Student's] official school records? (emphasis in original) B-51
50. The record strongly establishes that the parents had recently received information from the Board exactly the opposite from the information set forth in the Board's April 23<sup>rd</sup> letter. In particular, Mrs. Bush, the classroom teacher recorded throughout the entire school year that the Student had completed his homework with a letter "M," signifying that it was completed "much of the time," the second highest grade on the report card. B-59. Mrs. Cohen, the Board's reading teacher reported in her March 21, 2002 Progress Report that the Student had "consistently" returned his books and homework promptly, P-16. Mr. Bianca, the Board's special education teacher had credited the Student's recent growth especially to his classroom teacher *and* to his family in his March, 2002 Progress Report. P-15. Further, the testimony of each of these three individuals, Mrs. Bush, Mrs. Cohen and Mr. Bianca, on the issue of homework and the writing of this letter was variously evasive, hesitant and not believable; and on this point none of them were credible. Testimony of Thomas Bianca, testimony of Susan Bush and testimony of Judith Cohen.
51. On April 12, 2002, Dr. Cherkes-Julkowski evaluated the Student again. In this evaluation Dr. Cherkes-Julkowski stated that the Student "became sweaty and pale

during a math assignment and he was brought to the nurse. He vomited and was sent home.” B-49(1-2). This incident was reported to Dr. Cherkes-Julkowski by the Student’s mother. Testimony of Dr. Cherkes-Julkowski. Mrs. Bush testified, however, that the Student went to the nurse around lunchtime and subsequently went home with a fever. The Student then remained out of school the following day with a fever. In general, the Student did not appear to have somatic illnesses, as most of his illnesses involved a fever and were in proximity to other children’s absences for the same reasons. Testimony of Ms. Bush. Further, Dr. Cherkes-Julkowski reported that the Student’s “math computation performance has declined relative to his peers and not enhanced but diminished his standing.” Dr. Cherkes-Julkowski contrasted the Student’s performance with his peers despite admitting that she had never observed the Student in his classroom. In fact, although Dr. Cherkes-Julkowski originally testified that the Student could not keep pace with his classmates, she admitted that she had never observed the Student’s class. Testimony of Dr. Cherkes-Julkowski, Testimony of Ms. Bush.

52. Once again Dr. Cherkes-Julkowski did not observe the Student in class or contact his teachers as part of her evaluation leading to misunderstanding on her part thereby likely resulting in a lower than deserved score for the Student. When evaluating the Student, Dr. Cherkes-Julkowski presumed he was being taught with a methodology that the Granby Public Schools was no longer using. Testimony of Ms. Bush. For example, Dr. Cherkes-Julkowski used a horizontal format when doing computations, whereas Mrs. Bush employs a vertical format. Additionally, Mrs. Bush testified: ‘[Dr. Cherkes-Julkowski’s] expectation that [the Student] should have been able to add carrying the ones, the tens, and the tens to the hundreds was not a valid expectation. Here in Granby, we teach that now in third grade.’ Id.. Ms. Cohen testified that some of parts of the decoding portion of the evaluation (diphthongs and r-controlled vowels) are not covered until mid to late second grade in Granby; therefore the Student should not have been expected to have known them in April. These types of errors and omissions as well as opposing testimony by other of the parents’ own witnesses undermine the reliability of this witnesses’ evaluations. See testimony of Dr. White-Roath on the use of a electronic reader, testimony of Ms. Cohen, testimony of Dr. Cherkes-Julkowski.
53. Mrs. Bush was surprised by Dr. Cherkes-Julkowski’s April 12, 2002 evaluation, because what Dr. Cherkes-Julkowski was reporting was different from what Mrs. Bush was observing. For example, Mrs. Bush saw the Student as a child who had a far better grasp of phonetic knowledge than Dr. Cherkes-Julkowski reported. In fact, Mrs. Bush believed that the Student “overly relied” upon phonetic patterns rather than under utilized them as Dr. Cherkes-Julkowski reported. Testimony of Ms. Bush.
54. In April 2002, the same month that Dr. Cherkes-Julkowski re-evaluated the Student, the Cognitive Abilities Test was administered to all 176 second-graders in the Granby Public Schools. The system averages for the 176 students were: Verbal – 110; Quantitative – 110.7; and Non-Verbal – 112, for a Composite of 112.6. B-67. The Student’s scores were: Verbal – 121; Quantitative – 111; and Non-Verbal – 107, for a Composite of 114. B-60. These scores placed the Student almost exactly average for the Granby second-grade population. The Student was required to read in the verbal and in some of the quantitative sections of the Cognitive Abilities Test, but no

- modifications or provisions were made for him when he took the test. Testimony of Mr. DiCorleto, B-60, B-67.
55. From May 8 through 23, 2002, Ms. Cohen evaluated the Student as part of his End of Year Reading Assessment for IEP Program Review. Based upon her evaluation, Ms. Cohen found that the Student had made satisfactory progress on his reading goal, which was: “[The Student] will improve his reading skills to an end of grade 2 level.” Testimony of Ms. Cohen, B-55.
  56. In May and June 2002, Mr. Bianca assessed the Student’s progress on his spelling and written language skills goal, which was: “[The Student] will improve spelling and written language skills to grade 2 standards.” Mr. Bianca determined that the Student had made satisfactory progress on this goal, having mastered three of the five objectives and made satisfactory progress on the other two. As part of his assessment, Mr. Bianca also administered the KeyMath-R. At the time of that assessment, the Student was approximately 8 years, ten months old. B-1. The Student’s scores on the KeyMath-R demonstrated that his scores had an age equivalency of 11-11 on Basic Concepts, 8-7 on Operations and 10-1 on Applications, for a overall age equivalency of 9-10. These results contrasted sharply to Dr. Cherkes-Julkowski’s April 12, 2002 statement that the Student’s “math computation performance has declined relative to his peers and not enhanced but diminished his standing.” B-49. They comported, however, with the Student’s scores on the April 2002 COGAT, on which his quantitative score of 111 was slightly higher than the Granby average of 110.7. B-55, B-60 & 67; Testimony of Mr. Bianca and Mr. DiCorleto.
  57. On June 3, 2002, the Board convened the Student’s annual review PPT meeting. B-56. At the June 3, 2002 PPT meeting, the Board offered to reimburse the parents for the cost of the tutoring they had procured for the Student during Summer 2001, which had been provided by a Board kindergarten teacher, but at that point the parents rejected the Board’s offer. The Board also offered to pay for eighteen hours of summer tutoring by Dr. Mary White-Roath, the tutor chosen by the parents for the upcoming summer (2002). The parents wanted more hours and rejected the Board’s offer, and instead retained Dr. White-Roath on their own. Testimony of Mr. DiCorleto, testimony of Mother.
  58. The Board had proposed IEP goals and objectives for the 2002-03 school year. At the June 3, 2002 PPT meeting, the Board members of the PPT recommended a total of 3.0 hours per week of special education services in written language, spelling and math, and 2.5 hours per week of related services, specifically reading instruction from the reading consultant. The parents did not accept the proposed IEP and requested an opportunity to review the draft IEP goals and objectives with Dr. Cherkes-Julkowski, who was unable to remain for the entire PPT meeting. B-56.
  59. From June 24, 2002 through August 27, 2002, Dr. Mary White-Roath provided one-on-one tutoring to the Student. P-14, P-58, Testimony of Dr. White-Roath.
  60. Dr. Mary White-Roath presented her Curriculum Vitae that demonstrated an extensive amount of training and experience, both professional and practical, in the areas of special education and reading instruction. She not only served as adjunct faculty on several colleges and universities but she had extensive experience teaching children to read. She has not been formally trained in Lindamood Bell but she does

use their manual. She had been trained in Orton-Gillingham in 1978 and Lindamood-Bell is an offshoot of that program. She has had training in the Wilson reading program. She uses an eclectic approach and varies tasks until a skill is mastered. She testified in a direct and credible manner. P-49, Testimony of Dr. White-Roath.

61. When Dr. White-Roath began working with the Student in the summer of 2002 he had completed second grade. The Student's vowel sound skills should have been present and he definitely did not have it. He did not know his alphabet sounds in isolation. For instance, he would say "ka" for "k". Out of fifty-six possible vowel sounds, the Student only knew approximately five. The witness testified that at the end of the second grade, the Student was at the end of first grade in terms of his fluency, but he was not a nonreader as implied by Dr. Cherkes-Julkowski testimony that the Student couldn't read on his own. On this last point the Student's Mother had also testified that during Summer 2001 the Student read numerous books as part of the State of Connecticut summer reading program. P-14, Testimony of Mother, Testimony of Dr. Cherkes-Julkowski, Testimony of M. White-Roath.
62. For this Student, reading sessions of one-half hour more frequently are more valuable than longer sessions less frequently. Continuity and consistency are essential, even if it means missing other school activities such as assemblies. The Student needs well trained instruction which means the teacher must provide direct, systematic, explicit instruction using a variety of tasks to keep the Student engaged until the skill is mastered. A whole language and phonetic approach is needed. The Student is not ready for guided reading. An electronic reader, recommended by Dr. Cherkes-Julkowski, is a total waste of time and would likely interfere with teaching him to read. Dr. White-Roath believes 1:1 instruction is essential for the Student. She uses both Lindamood Bell materials and Wilson materials with the Student; both are needed because Lindamood Bell is a slower paced program, but Wilson, which may be too fast at times, also helps retain his interest. Testimony of Dr. White-Roath.
63. The parents wrote the Board on June 13, 2003 and requested several changes in the draft IEP that had been proposed to address reading, math, writing, fluency, articulation, problem solving, and certain modifications to the regular classroom environment. B-58.
64. The Board scheduled a PPT meeting on September 6, 2002, B-65, in order to review the IEP changes requested in the parents' June 13, 2002 letter. B-68.
65. The Board proposed another draft IEP for consideration. The parents did not accept the draft IEP presented at the PPT meeting.. The Board stated that it would not reimburse the parents for the 1:1 tutoring costs associated with Dr. Mary White-Roath; the Board was aware that the parent intended to take the Student to frequent tutoring sessions with her; the parents were aware that the Board's position was that they had competent staff (third grade reading consultant Judy Latonie) to provide the needed services. The parents did agree to allow Dr. White-Roath and Ms. Latonie consult regarding the Student reading and spelling goals and program. IEP. B-68.
66. Dr. White-Roath did not know the credentials of Judy Latonie, the Board's third grade reading consultant, but they did speak for approximately ten minutes by phone and Dr. White-Roath felt Ms. Latonie was knowledgeable. Ms. Latonie indicated that she was going to recreate what Dr. White-Roath had been doing with the Student. She even spoke of providing 1:1 three days a week. Testimony of Dr. White-Roath

67. Judith Latonie, a reading consultant at Kelly Lane School, has a Bachelor's in Psychology, a Master's in Child Development, and a Sixth Year Degree in Reading and holds teaching certificates in pre-k through three, as well as in four through eight for general education, a Remedial Reading Certificate for kindergarten through twelfth grade, as well as an administrator certificate in the area of reading consultant. Testimony of Judith Latonie.
68. Ms. Latonie provides group and one-to-one reading instruction to both regular education and special education students with reading difficulties. One of the means Ms. Latonie uses to monitor the reading skills of children in the building is by keeping track of the CMT scores. Id.
69. The Board sent the Parents a copy of the September 9, 2002 IEP per a letter dated September 11, 2002. B-72. By a letter dated September 16, 2002, the Parents advised the Board that they were rejecting the 2002-03 IEP that had been proposed at the September 9, 2002 PPT and indicated that they would be contacting the Board soon to schedule another PPT. B-73.
70. In September 2002, Ms. Latonie spoke with Dr. White-Roath regarding what the latter was doing with the Student and also discussed transferring that tutoring to Kelly Lane school, which Dr. White-Roath believed would be appropriate. In fact, both Ms. Latonie and Dr. White-Roath felt that the tutoring could be successfully transferred to Kelly Lane. Ms. Latonie communicated this to the parents by way of a memo dated September 17, 2002. Id., B-90
71. Ms. Latonie had consulted with the third grade teacher to work out a program for the Student's special education instruction. The schedule they worked out demonstrated careful thought and consideration of the parents' concerns. The Student's proposed program could start on three days a week at 8:00 a.m., before the school day, so the Student wouldn't miss much of the regular classroom experience. This had been a concern of the parents in the past. The schedule also involved varying the times on different days so that the Student would not be missing the same thing in the regular class every day. The September 17, 2002 memo invited the parents' input and indicated that the teachers were flexible and would be receptive to the parents' preferences. Testimony of Ms. Latonie, testimony of Mother, B-90.
72. On September 30, 2003, Ms. Latonie wrote the parents again regarding scheduling, this time addressing the Student's desire to participate in chorus. Again, the letter was professional and demonstrated concern for the parents' input. B-91.
73. The parents requested a Due Process hearing through a letter dated September 30, 2003. The parents presented the following requests/issues:
  1. Reimbursement of daily 1:1 reading and spelling instruction with Dr. White-Roath, including tuition and transportation.
  2. Reimbursement for summer tutoring costs of Dr. White-Roath.
  3. Reimbursement of costs for an annual educational assessment of progress and program by Dr. Cherkes-Julkowski.
  4. Alignment of the school based instruction with the instruction provided by Dr. White-Roath.
  5. Consultation between school based staff and Dr. White-Roath at Board expense.

6. Reimbursement of all educational expenses incurred by the parents, as requested in previous PPT meetings.
  7. Provision of an independent assistive technology evaluation.
  8. And per the parents' Prehearing Statement of the Issues dated October 22, 2003, the additional issue of whether the Board has denied the Student FAPE during the 2001-02 and 2002-03 school years.
74. The issue of reimbursement for Summer 2002 reading services was subsequently resolved by the parties and that was ultimately not an issue at this hearing. In addition, the issue of whether the Board had to provide an independent assistive technology evaluation was subsequently withdrawn by the parties and that is not an issue at this hearing. Student's Brief.
75. In October 2002, the Student, then a third grader, took the off-level Connecticut Mastery Test ["CMT"]. On the CMT, the Student achieved mastery in fifteen of sixteen areas under Mathematics. Granby students generally score higher on the CMT than the state norm. Nonetheless, the Student's overall raw score of 83 in Mathematics was higher than the school average of 80 and the district average of 80.1. Testimony of Ms. Cohen, B-83, B-84.
76. The Student mastered one of three categories under Reading Comprehension. This was only slightly below the district average of 1.5 categories, the school average of 1.4 categories, and the class average of 1.6 categories. *Id.*
77. The Student did not master either category under Editing and Revising, but only 49% of the district, 50% of the school, and 57% of the class mastered Composing and Revising, and only 47% of the district, 49% of the school, and 62% of the class mastered editing. B-84.
78. The Student mastered the Writing Sample, having achieved goal on the Holistic Writing. B-84. Only 24% of his class attained that goal. *Id.*
79. On the October 2002 CMT, the Student also scored a 46 on the Degrees of Reading Power ["DRP"], the state goal for which was 39. B-83; B-84. The DRP "is usually the test that's looked at to determine whether a child is in need of reading services." Testimony of Ms. Cohen, testimony of Ms. Latonie. The Student's 46 placed him only one point below the school and district averages of 47, and three points below his class average of 50. B-84. The Student was allotted ten more minutes than the seventy minutes allocated by the state on the DRP. P-38, Testimony of Mr. DiCorleto, Testimony of Ms. Cohen.
80. The parents did not accept the Board's offer to have Ms. Latonie work with the Student, and rather, kept the Student in private tutoring with Dr. White-Roath. As a result the Student was tardy 57 times due to the tutoring during the 2002-2003 school year. Dr. White-Roath had never had a child who came to her during the school day for tutoring. Testimony of Mother, testimony of M. White-Roath, P-58, P60.

**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. §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. 10-76h-14
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. Addressing the *first* prong of the *Rowley* inquiry, the Board should have evaluated the Student’s eligibility for special education and related services after the April 24, 2001 PPT meeting pursuant to the IDEA’s *Child Find* regulations. 34 C.F.R. §300.125(a)(iii). At the April 24, 2001 PPT meeting the Board had received sufficient input from the parents regarding their son’s marginal educational performance, 34 C.F.R. §300.535(a)(1); as well as possessing information from its own educational files establishing that the Student had difficulties with reading, spelling, letter sounds, and writing.
6. The Board argues that The *State of Connecticut Department of Education Guidelines for Identifying Children with Learning Disabilities* [“*Guidelines*”] require that

additional regular education strategies and programs be in place and tried before an evaluation is done. *Guidelines*, p. 17. If the Student has not participated in an intervention process, the argument continues, school districts are directed that no evaluation is recommended. This argument is faulty for two reasons. First, the guidelines are just that, guidelines not law. They have not been enacted into law and therefore have not undergone the process of discourse and scrutiny that statutes and regulations undergo. Consequently they do not have the force of law and, therefore, while at times helpful in a due process hearing, they are not controlling on a due process decision. Further, the Board's argument on this point would potentially undermine the IDEA's *Child Find* regulations, which do have the force of law. 34 C.F.R. §300.125(a)(iii). Pursuant to their argument even a board that abrogated its responsibility under *Child Find* to affirmatively identify, locate and evaluate children with disabilities, would be rewarded with a time period during which the implementation of special education services, and their attendant costs, would be delayed while regular education interventions are initiated. Therefore, the correct question is not whether the *Guidelines* should be applied to this case, but rather, whether there was enough data available to the Board for the IDEA's *Child Find* regulations to have required the Board to initiate regular education interventions sooner, so that, as of April 2001 the requirements of both the *Guidelines* and *Child Find* would have been satisfied.

7. The issue for the April 24<sup>th</sup> PPT was not whether the Student would be eligible for special education and related services, but whether he should be referred for an evaluation in order to determine his eligibility. State regulations require that "... a diminished ability to listen, speak, read, write, spell, or do mathematical calculations..." be established in order to determine the existence of a suspected learning disability. RCSA §10-76a-2(d). See also 34 C.F.R. §300.541(a)(1), (2). The record as of April 24, 2001 PPT indicated that the Board was aware that the Student had difficulties with certain portions of the language arts curriculum during kindergarten and first grade per the report cards and teacher concerns. Further, the Board had referred the Student to its Early Reading Intervention (ERI) services during March, 2001 and the Board had recommended that the Student attend a summer reading intervention program after the end of the first grade. Further, the Student was the oldest child in his class, and although Board staff dismiss the significance of this stating that it is only the amount of instruction, not age that is relevant; the Student's age removes issues of age (being very young for a grade) as a factor affecting his reading ability. The Board argues that to abide by the *Guidelines* their regular education interventions needed more time before assessing whether they were working and considering evaluation. However, the Board had enough information supporting a need for increased regular education interventions at least since January 2001. The evidence supports the conclusion that there simply was not enough space in the ERI program so the Student had to wait. Once he started his teacher was not trained in Lindamood Bell, she did not provide the scheduled amount of sessions and then she inaccurately reported on the number of sessions in her end of the year report. To the extent that the Board did not have an ample enough opportunity to intervene with regular education strategies pursuant to the *Guidelines*

it is there own delay in initiating those strategies that foreshortened their time period for assessment of the effectiveness of those strategies. The Board should have arranged for a comprehensive multi-disciplinary evaluation at the April 2001 PPT meeting.

8. The Board had up to forty-five (45) school days to evaluate the Student's eligibility for special education from the date of the April 24<sup>th</sup> PPT, RCSA §10-76d-13. If it had elected to complete the evaluation requested by the parents, it could have completed the evaluation either before the end of the 2000-01 school year or schedule a PPT meeting shortly after the commencement of the 2001-02 school year. The Hearing Officer does not find it credible that the Board had stated that it was prepared to evaluate the Student during the Fall 2001. No further PPT or date for future evaluation was set at the April 2001 PPT. It was only after the Board had received Dr. Cherkes-Julkowski's evaluation that it scheduled a PPT on September 9, 2001 in order to discuss the results of that evaluation. Services began after the December 7, 2001 PPT identified the Student as eligible.
9. The fact that the Board had a forty-five time limit did not bar an entitlement to special education during that time period. *Unified School District v. Conn. Dept. of Education*, 64 Conn. App. 273, 298, 35 IDELR 30 (2001). Consequently, the Student was deprived of special education during the 2001-02 school year, by the actions of the Board, for approximately four months.
10. Violations of the IDEA's procedural requirements do not automatically mean that a denial of FAPE has occurred, however, when the procedural violations result in the loss of educational opportunity then a denial of FAPE has clearly resulted. *Scottsdale (AZ) Unified School District, supra*, 38 IDELR 204. In the present matter, the Board's failure to evaluate the Student's eligibility for special education in a timely manner from the April 24, 2001 PPT meeting, to December 7, 2001 PPT meeting, had resulted in the Student losing approximately four (4) months of educational opportunity during the 2001-02 school year.
11. The procedural guidelines of IDEA are designed to guarantee that the education of each child with disabilities is tailored to meet the child's unique needs and abilities. 20 U.S.C. Secs. 1412 and 1415. These procedural guarantees are procedural safeguards against arbitrary or erroneous decision-making. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1041(5th Cir. 1989).
12. The obligation to provide an IEP "generates no additional requirement that the services so provided be sufficient to maximize each child's potential," *Rowley*, 458 U.S. at 198, 102 S. Ct. at 3046-47, for "[a]ll the school system must provide is an IEP which is 'reasonably calculated' to provide an 'appropriate education,'" *Rome School Comm. v. Mrs. B.*, 247 F.3d 29, 33 (1<sup>st</sup> Cir.2001), because while the "IDEA requires states to provide a disabled child with meaningful access to an education, . . . it cannot guarantee totally successful results." *Walczak*, 142 F.3d at 133 (citing *Rowley*, 458 U.S. at 192, 102 S. Ct. at 3043-44). However, an IEP must provide an

opportunity for more than trivial advancement in order to satisfy the IDEA's FAPE requirements. *Mrs. B. v. Milford Board of Education* 103 F.3d 1114, 1121 (2d Cir. 1997). In this case, the evidence establishes that the Student had made educational progress sufficient to satisfy the standard set in *Mrs. B.* during his years at the Kearns School and now at the Kelly Lane School. In October 2002, while in third grade at the Kelly Lane School, the Student far exceeded the goal on the DRP, obtaining a score of 46, which was only four points below the goal for students in *fourth* grade. His most recent report card that was introduced into evidence also reflects that the Student continues to make steady growth in reading and that his work in language arts is between average to excellent. Similarly, in mathematics the Student has been generally excellent, although he continues to struggle with math facts. In short, the Board has satisfied its obligation to provide the Student with a free appropriate public education for the 2001-2002 and 2002-2003 school years.

13. Due Process Hearing Officers have the authority to provide compensatory education as an equitable remedy for a denial of FAPE. *Inquiry of Kohn* 17 EHLR 522 (OSEP)(2/13/91)(citing with approval *Lester H. v. Gilhool* 916 F. 2d 865 (3d Cir. 1990), *Burr v. Ambach* 863 F. 2d 1071 (2d Cir. 1988)). "Compensatory education effectuates this purpose by providing FAPE which the child was entitled to receive." *Id.* The Board had ample opportunity to evaluate the Student and determine his needs for special education prior to the December 7, 2001 PPT meeting. It elected not to do so and the Board should not be allowed to profit from its own inaction after it was placed on notice at the April 24, 2001 PPT that the Student had issues per the parents' concerns and the Board's own records. Since this matter does not encompass a denial of FAPE for the 2000-01 school year, the Hearing Officer is not authorized to provide any relief for that school year. However, the Hearing Officer finds that compensatory education is appropriate for a four-month period beginning the 2001-2002 school year during which the Student should have, but did not have, a program in place for reason of the Board's failure to evaluate him in April 2001. *Mrs. C. v. Wheaton* 916 F.2d 69 (2d Cir. 1990), *Everett v. Santa Barbara High Sch. Dist.*, 36 IDELR 35 (9<sup>th</sup> Cir. 2002).
14. A parent has the right to an independent evaluation at public expense if they disagree with an evaluation obtained by the public agency and if they request such independent evaluation. 34 C.F.R. §300.502(b)(1)-(2). In this case, the Board rightly reimbursed the parents for Dr. Cherkes-Julkowski's June 13, 2001 evaluation. However, the evidence does not support the conclusion that the parents expressed disagreement with the TEAM evaluation or that they requested that the Board provide them with an independent evaluation prior to unilaterally obtaining Dr. Cherkes-Julkowski's April 12, 2001 and April 28, 2003 evaluations. Consequently, they are not entitled to reimbursement for those evaluations.
15. The parents request that the Board be ordered to retain Dr. Cherkes-Julkowski to assess the Student on at least a yearly basis. This is not appropriate for several reasons. First, for reasons stated in the Findings of Fact, Dr. Cherkes-Julkowski's evaluations in this matter were not very reliable. Therefore, she would not be a good

choice for independent evaluator if one were needed. Second, the record reflects that the Board has competent and properly trained and competent staff (e.g. Ms. Latonie) who could cooperate with Dr. White-Roath to transition the Student back to the Board for his reading program and provide the necessary services to this Student. The only significant difference is over the issue of how much of the instruction needs to be one to one, and at what point does it change. This is a fluid situation by definition, with the Student constantly changing as he matures and learns. Just as it is valid that the Student has made progress with the 1:1 instruction provided by Dr. White-Roath (who in fact provided most of his reading instruction), Ms. Camp made a number of good points about the benefits of small group instruction, at least for some of the learning to read experience. Often, in Board settings the treatment providers participate in the evaluation process (as with the TEAM evaluation). With properly trained service providers in place who are willing to respect and consider the parents' concerns, the need for an outside evaluator should not be necessary; nor is it likely to promote any improvement in the progress this child makes.

16. The IDEA provides that "the 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 . . . cannot be achieved satisfactorily." 34 C.F.R. §300.550(b)(2). In this case, Dr. White-Roath testified that the Board's reading consultant was "knowledgeable," and appeared ready to implement a program similar to that which Dr. White-Roath had been providing. On September 17, 2002, Ms. Latonie wrote to the Student's mother: "[Dr. White-Roath] and I both feel that we can successfully transfer [the Student's] on-going work in the Wilson program to Kelly lane." In short, there is no evidentiary basis that would support the parents' claim that the Student requires reading instruction outside of school at the Board's expense for the 2002-2003 school year to have F.A.P.E. The least restrictive environment for the Student's reading instruction for the 2002-2003 school year is Kelly Lane School.

### **FINAL DECISION AND ORDER**

1. The Board failed to timely evaluate the Student when initially requested in April 2001. The Board did appropriately evaluate him in the Fall 2001 and subsequently.
2. The Board provided the Student with an appropriate IEP for the 2001-02 and 2002-03 school years.
3. The Board shall reimburse the parents for four months of educational expenses related to the private tutoring provided by Dr. White-Roath for the 2002-03 school year.

4. The Board shall not, as part of this order, reimburse the parents for their expenses for the evaluation reports from Dr. Cherkes-Julkowski for the 2001-02 and 2002-03 school years.

5. The Board shall convene a PPT meeting within fifteen days from the date of this decision to discuss necessary revisions to the Student's 2003-04 IEP, taking into account the input from the Student's parents and the recent reports and recommendations from Dr. White-Roath, P-58. The Board will schedule this at a time during which Dr. White-Roath can attend.

6. The Board shall pay for the services of Dr. White-Roath to consult as needed during the 2003-2004 school year up to a maximum of thirty hours from September 2003 through June 2004. This will include time attending PPTs and consulting in person or by phone with Board staff. It will not include any private tutoring sessions of the Student, should the parent elect to continue these. With this one exception, Dr. White-Roath will decide how her time is allocated, working in conjunction with the PPT.