

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Milford Board of Education

Appearing on behalf of the Parents: Attorney Jennifer D. Laviano
Jennifer D. Laviano, P.C.
77 Danbury Road, Suite C-6
Ridgefield, CT 06877

Appearing on behalf of the Board: Attorney Michael P. McKeon
Sullivan, Schoen, Campane & Connon, LLC
646 Prospect Avenue
Hartford, CT 06105-4286

Appearing before: Attorney Deborah R. Kearns, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Local educational agency failed to provide a free and appropriate public education for the child and if not are the parents entitled to reimbursement for the unilateral placement at a private school for the 2002-2003 school year.
2. Whether the Local educational agency failed to provide a free and appropriate public education for the child and if not are the parents entitled to reimbursement for the unilateral placement at a private for the 2003-2004 school year.

PROCEDURAL HISTORY:

The parents requested Due Process seeking reimbursement for the 2002-2003 school. A request for recusal was denied. The parties agreed to all delays in the hearing schedule along with other circumstances, to accommodate witness appearance. On March 5, 2004, after the Parents rested their case, the parties agreed to add the 2003-2004 school year as an additional issue for hearing. The parties requested time to order transcripts and prepare post-hearing briefs.

SUMMARY:

The student has severe dyslexia and is gifted. He was educated in the local educational agency school (LEA) until fifth grade. The 2001-2002 IEP was in dispute, the parents requested the child be placed in private school with a program for dyslexic students. The child remained at the school when the parties reached a settlement in a Due Process action which concluded September 2002. In March 2002, the parties again failed to reach agreement for the 2002-2003 school year. The child remained at the private school and the parent filed for Due Process in February, 2003. On March 5, 2003, the dispute over the 2003-2004 school year was added to the issues for hearing.

FINDINGS OF FACT:

1. In kindergarten, the child first showed signs of difficulty with reading and writing. In first grade, the child's first year in the LEA school, the mother informed the teacher that both she and her brother are dyslexic and inquired whether that could be the child's problem. The teacher responded that she did not think dyslexia was the problem. In the 1996-1997 school year, the child mother then spoke with the school psychologist and asked if he should be tested. The school psychologist informed her that they do not test children until they are at least seven years old, sometimes, not until second grade. No testing was conducted at that time. (Testimony, Mother, P-5)
2. In the 1997-1998 school year, the mother again told his teacher of her concerns regarding dyslexia. An IEP meeting convened in December and again February 26, 1998 to discuss the results of the testing. At this meeting the child was classified as learning disabled. The child had a full scale I.Q. Score of 124 with a Verbal I.Q. Score of 101 and a Performance I.Q. Score of 145, a 44 point spread, between his Verbal and Performance I.Q., indicating a gross functional discrepancy between the respective domains. There is a 35 point difference between his Verbal Comprehension and Perceptual Organization indices. The IEP team recommended a program for reading comprehension, basic reading skills, daily functioning, mathematics and written expression, with services provided in the resource room and the regular classroom with modifications. (Exhibits, B-3, B-4, B-5, B-6 p.7-13, B-7, B-8 P.1, B-11).
3. On April 9, 1998, the IEP meeting reconvened and recommended that the Child be identified as a Learning Disabled/Gifted student. (Exhibit B-11).
4. In the third grade the placement was 8.25 hours per week in a resource room for reading, writing, and math. During the 1998-1999 school-year the child spent little time in the regular classroom. "He wasn't even allowed to go to the library that year, because that was the time he was supposed to be in the Special Ed. in the resource room and he was upset about it. Science projects were not able to be shared with the class because he was in resource room". On the Metropolitan Achievement Tests administered in September of third grade indicated the child fell in the "below average" range in 5 out of 12 "content clusters" tested in math, he was in the "average" range in 6 areas and "above average" on one subtest. In Language he was within the average range. Yet, on the April, 1999 administration of the Metropolitan Achievement Test in

third grade, the child fell in the “below average” range in 14 out of 18 “content clusters” tested in the math area, and was exempted from Language testing. (Exhibits, B-16, B-20, B-24, B-27, P-1, P-2, Testimony, Mother)

5. On May 20, 1999, the IEP team reconvened, The parents’ requested, the child receive math instruction in a regular classroom setting. The mother requested that the child be placed in a regular classroom with a special education and a regular education teacher. The team agreed to the parent’s requests, increasing the amount of special education instruction to 9.5 hours per week. (Exhibit B-27)

6. The fourth grade year, 1999-2000 the child’s IEP reduced time in the resource room placing him in the mainstream math program with a paraprofessional. He went to the resource room once a day and was much happier to be in the mainstream for most of his day. He struggled with homework which took him two to three hours a night to complete, he was sometimes unable to complete it, because he had to have everything read to him. The mother testified, “Basically, he wasn’t really reading at all”, writing also continued to be a major struggle for him. Grade 4 Connecticut Mastery Testing indicated the child was exempt from testing in Language Arts. On the math test, he mastered only 66 objectives out of 121, with the goal being 103. (Exhibits, B-27, B-24, P-3, Testimony, Mother)

7. An IEP meeting held on March 27, 2000 to plan for the fifth grade, placed the child in a mainstream classroom with resource room once a day for reading and writing and occasionally for math. In fifth grade the child’s ability to keep himself organized began to deteriorate, as the workload increased. The child’s teachers did not penalize him for this but his mother was concerned that he was not being prepared for sixth grade. “By the end of fifth grade, it was falling apart for him, as far as keeping organized and doing all the assignments.” (Testimony of Mother, B-30, B-53)

8. The team noted that in March 2000 the child had scored a 119 in math applications and a 111 in math comprehension, and that he had received a B+ in math on his report card. At the March 27, 2000 meeting, the team stated under “Concerns/Needs” that the child “needs a highly structured system approach to reading instruction. He needs tremendous practice with phonetic/linguistic base (include[ing] phon[emic] aware[ness].” Consequently, the team recommended that he spend one hour per day in the resource room working with a special education teacher on decoding and encoding. The team also recommended approximately thirty separate modifications and adaptations be implemented in the regular classroom. (Exhibit B-30, p.3-12, B-53, Testimony of Mother)

9. During this same period of time, in Spring 2001, the special education teacher co-authored an article titled “Dyslexic/Spatial-Temporally Gifted Child: A Case Study” with two other LEA teachers which was based upon their work with the child. The mother testified that the article did a “good job of capturing the child and it reflected . . . specific knowledge of the child. The paper reviewed his strengths and weaknesses and reviewed education strategies. The interest in using the child as a case study was the fact that he was so severely learning disabled as well as gifted. The study makes it clear educating a severely learning disabled gifted child was challenging but demonstrated an educational program that would be successful. In the

concluding paragraph, the paper states that if the child does not receive the proper instruction he requires for his significant learning dyslexia, he would lose his giftedness. (Exhibit P-5, Testimony, Parent, Transcript, 5/19/03,)

The research reviews the literature on children with the unique combination of giftedness and disability. The paper applies the research to the student, his learning style and the success or failure of applied strategies in formulating the child's program. The authors note, despite intensive remediation, he continues to struggle, the child's special education teacher, used a motor-tactile approach. The team was able to provide opportunities for him to be free to learn without being constricted by the fact that his computation and handwriting were not up to grade level expectations. With this type of support the child was able to advance two grades levels in math computation and four grade levels in math application in a single year. The specialist did not want to miss the critical periods when the brain most easily soaked-up information, consequently they moved away from teaching isolated skills towards integrating skills in authentic ways. It can not be emphasized enough that both remediation and gifted programming for this type of child required an intensive psycho-kinesthetic approach involving both whole body and fine motor skills. The child's hands become a critical bridge between his brain and learning. For example instead of reviewing a list of words visually, he categorized them into a sorting file. In sports he works with his hands to integrate right and left hemispheres. In his gifted program, he worked with his hands using science equipment, taking small appliances apart, and building small inventions. He is taught with a motor-tactile approach using strong non-verbal, psycho-kinesthetic ability to help open verbal ability. (Exhibit, P-5)

The article suggests a systematic program for the gifted/learning, disabled child must remediate, challenge, maintain self-esteem and motivate. The article lists strategies that have proven unsuccessful for the child, pullout programs that focused on his skill level but ignored his comprehension level, leaving class for the resource room, whole language. The article suggest the child must expend five times the brain energy to perform ordinary language tasks. The article concludes demanding the need for literacy, might in the end create a reader but lose an inventor. The collaborative/consultation approach allowed the student to significantly increase his ability to learn, progress is slow. A gifted/learning disabled student's individual and group counseling occur in the school setting. The school program was able to strike a balance by providing his remediation needs at the same time the gifted program enhanced his self-esteem and developed his spatial talents. (P-5 pp.19-29)

10. At the March 20, 2001 IEP meeting, the team reviewed the child's present levels of educational performance. The report card shows a B in Math; an A+ in Science, and an A in Social Studies; and in the following modified courses had received a B in Reading; a C in Written Language; and a D in Spelling. (Exhibit B-38)

11. From September 1998 to March 2001 the KTEA evaluations demonstrated that in the span of a 2.6 year difference in grade levels, the child's instructional levels had increased 8.2 years in math applications, 5.2 years in math computation, and 4.2 years in reading comprehension. (Exhibit, B-16, B-3)

12. The IEP team met on March 20, 2001 to recommend the child receive, fifteen hours of reading instruction during the summer, and 7.5 hours of weekly special education instruction in the areas of reading and writing for the 2001-2002 school-year. The team also recommended twenty modifications to be implemented in the regular classroom for the 2001-2002 school-year. The child showed progress in most of the subtests for the KTEA, by objective criteria he was showing improvement while placed in a program at the LEA's school. The parents viewed some areas of the child's behavior differently and continued to be concerned about a very bright 11 year-old, who despite three years of intervention for reading, still required having everything to be read to him. He could not read well enough to determine "whether a bottle was shampoo or body soap. On March 20, 2001, an IEP was held to plan for the sixth grade. The IEP created for the 2001-2002 school year states that severe dyslexia complicates his learning; he requires direct multi-sensory instruction in a small group as well as assistance reading in the classroom. The team notes in its Multidisciplinary Evaluation Report the child requires assistance reading directions. He appears to understand all math concept presented, but requires one-to-one assistance to put his thoughts down on paper. (Exhibit, B-38, B-39, B-42, B-43, Testimony, Mother)

13. The parents did not agree with to the IEP and, filed for Due Process on June 29, 2001. The parents unilaterally placed the child at the private school (the School) for sixth grade. The parents and LEA reached a settlement regarding placement for the 2001-2002. (Exhibit, B-44, Testimony, Mother)

14. The private school is a boarding and day school for children with dyslexia or language-based disabilities. The Orton-Gillingham approach is utilized throughout the day to remediate students' language skills. All students receive a one-to-one 45 minute language training period every day. The curriculum is state-approved, teaching all major subjects, but is not a certified special education program. Teachers do not necessarily have an education degree but have a bachelors or masters degree in the subject area which they teach. Every teacher is an Orton-Gillingham tutor to ensure that the approach is carried over throughout each subject. All teachers must participate in 90 hours of Orton-Gillingham training every summer, which includes "work in cognition learning styles, the brain of the dyslexic, and some social and emotional issues that sometimes come with students with learning disabilities." This training is then continued during the year, in one hour and fifteen minute sessions every other week. The program focuses on helping children build self-esteem and self-confidence as students. (Testimony of Academic Dean, 5/19/03, Testimony, Parent 5/19/03)

15. During the 2001-2002 school year, at the private school the child had a one-to-one tutor to work with him every day as well as instruction in organizational skills. His class size ranged from six to twelve children, he did not have homework in the sixth grade, but had an extended school day He adjusted well socially and made gains in both reading and math. (Exhibit B-50, B-51, Testimony, Parent, 5/19/03)

16. In October of 2001, the child was evaluated by an independent psychologist. Her credentials include a Master's in Educational Psychology and a Certificate of Advanced Graduate Study, which is an additional 60 credits above her Master's, 45 credits in the School Psychology Doctoral Program at Fordham University and a School Psychology Certificate. She

has worked as a school psychologist, since 1974 most recently nine years, in a Connecticut public school. The psychologist administered the WISC III, the Woodcock-Johnson, and the Wechsler Individual Achievement Test, (WIAT). During testing, she observed the child had low self-esteem, he was reserved and self-conscious as a result of his reading problems. The WISC III showed a full scale I.Q. of 112, in 2001; he had a full scale I.Q. of 124, in 1998. The psychologist concluded the child's verbal skills had not increased over the three years span. Overall, the cognitive tests established the child was of average to very superior intellectual ability; he and should be able to perform at grade level if not for his significant learning disability. Her testimony based on the 2001 evaluation, a recommendation for a program would include a small classroom. (Testimony Independent, Psychologist, 7/14/03, pp. 27-45)

17. Testing performed on the child following his fifth grade year indicated that, despite having "superior intellectual abilities," He was not able to demonstrate proficiency in either writing or reading the printed word. The independent psychologist, the evaluator, summarized:

Lacking word analysis skills, the child appears to be at a loss to create or read words by associating sounds with single letters or with letter combinations. His ability to associate phonemes with graphemes is inaccurate and random. This is clearly seen in his decoding of both actual words and pseudo-words. He will guess or approximate when he reads or spells. He omits sounds, adds sounds, and reverses the order of sounds. He has particular difficulty with vowels, blends and digraphs. One can only sense the frustration he must feel, and the accompanying discouragement. He is very bright, yet he is reduced to achieving at the level of a child several years younger in basic reading and writing skills. (Exhibit, P-4, pg. 8)

18. The psychologist reviewed the IEP for the 2002-2003 school year, (B-49 p.5) outlines the special education services suggested for the seventh grade year. She critiques the program as follows: Goal one states the child will improve decoding and encoding, which is typically separated for a child with the severity of disability. Encoding and decoding are very different processes. The objectives for goal one, "will read and spell multi-syllable words" will read and spell combining vowel consonants here the objective for meeting the goal of reading should state how the child will meet the goal of reading." Just saying the child will read does not tell how he is going to process the information. He will utilize graphic organizers to help sequence thoughts prior to initiating a writing assignment of three paragraphs or more, I found writing such a big struggle for him. The services outlined for the child. The reading goal would be 3.75 hours per week, which the evaluator believes is not sufficient for the child who she believes requires intensive focus on reading. She does not believe the 7.75 hours per week of direct services and the two hours of collaborative in-class support for social studies and science is sufficient. The student will spend 19.5 hours per week in the mainstream, math will need to be highly modified for the student. Based on the July 10, 2003 evaluation, she believes he needs a program which concentrates on the reading basics because that is what is undermining his self-esteem, it is preventing him from reading text material, from reading literature and it blocks him from moving forward. The evaluator believes assistive technology such as Kerzwire (transcript phonetic spelling) 3000 is preferred to the Alpha-Smart, which has a two-line read-out. She believes he cannot rely on his reading skills for the seventh and eighth grade content. The student is experiencing anger, his cooperation is coming down in notches, the evaluator believes

he is building a protective wall around himself, he is defensive and believes it is important for him to be highly motivated, to see his own progress, to feel that he is getting somewhere, I think he feels like he is not making progress. It is hard for him, it is tiring fatiguing, he is going to become lethargic and lose motivation. He can't visualize words long enough to get them on paper. He is becoming very frustrated and angry. (Testimony, Independent, Psychologist, Transcript, 7/14/03, pp. 27-45)

The results of the July 10, 2003 assessments showed the child has maintained similar levels to his last evaluation. This is significant because with his severe learning disability he requires considerable training just to maintain achievement levels. She sees signs that he is learning an auditory approach to reading and learning to put phonemes together with words. The results indicate the child has received training in phonetic awareness, he is learning to put phonemes together into words and how to analyze words. To maintain his current levels of achievement, he requires an intensive focus on reading in the educational environment. (Testimony, Independent Psychologist, 7/14/03)

The independent psychologist provided a verbal report of the July 10, 2003 testing. The assessments administered were the Word Reading, and the Reading and Spelling parts of the WIAT. The independent psychologist compared subtests on the WAIT for the two-year period that the child had been at the private school. The child's standardized scores in Spelling on WIAT had decreased from 69 to 60; Reading Comprehension decreased from 41 to 40; and Word Reading decreased from 61 to 52; Pseudo-Word decoding scores remained the same at 76. She testified that after two years the child needs to see his own progress, in order feel that he's getting somewhere, because I think he feels like he's not really making progress. Recommendations based on the July 10, 2003 evaluation are for a program with intensive, language-based reading, writing and spelling program for a good part of the day. (Testimony, Independent Psychologist, Transcript 7/14/03, pp. 44-45)

19. The parent is pleased with the program at the private school, the work load in seventh grade was more difficult, including the addition of homework, the child was happier in the seventh grade and made academic as well as social-emotional gains. (Testimony, Mother, Testimony, Academic Dean)

20. The Academic Dean testified, only six of the private school's sixty full-time staff members are certified. The School provides its students with 45 minutes of daily language training. Instruction in phonemic awareness, decoding, fluency, spelling, dictation, vocabulary, reading comprehension and expository writing are included within those 45 minutes. The Academic Dean testified that the language-training program "is so unique, because . . . the program is consistently adapted specifically for that student's needs." The private school's Academic Dean testified that the language-training program "is so unique, because it's taught by someone who is highly trained in Orton-Gillingham." He later acknowledged, however, each student, receives the same 45 minutes regardless of the severity of his or her disability. It is reasonable to conclude the Dean meant the content aspect of the program is adaptable not the time. The language instruction is carried into the various subjects, because each subject teacher is also a trained reading instructor. (Testimony Academic Dean, Transcript 1/14/04 pp.8, 13, 38, 48-49)

21. The private school administers testing twice each year, the child was first tested in August 2001, results on the Wide Range Achievement Test-3 (WRAT) for Spelling standardized score of 75 and a grade equivalency of 2.0. After two academic years at the private school on the May 2003, WRAT for spelling, the he had a standardized score of 65, with a grade equivalency of 1.0. (Exhibit, P-6, P-8, Testimony, Academic Dean, Testimony, Parent Transcript 5/19/03, p.66) On the November 2001, Gray Oral Reading Test –4 (GORT) for accuracy, the child had a standardized score of 4 and a grade equivalency of 2.0. In May 2003, he had a standardized score of 2 and a grade equivalency of 1.7. On the November 2001 GORT for fluency, the child had a standardized score of one and a grade equivalency of 1.7. In May 2003, the child had the same standardized score and grade equivalency. On the November 2001 GORT for reading rate, the child had a standardized score of two and a grade equivalency of <1.0. Almost two academic years later, in May 2003, the child had a standardized score of three and grade equivalency of 2.2. (Exhibit, P-6, P-8, Testimony, Academic Dean, Testimony, Parent Transcript 5/19/03, p.66)

22. On the Stanford Diagnostic Mathematics Test, administered in November 2001 and May 2002 to measure progress in math achievement, the child’s grade equivalency on concepts and applications significantly decreased from a post-high-school to 8.4, and his percentile dropped from 94% to 65%. His overall math grade equivalency declined from 8.0 to 7.9 and his percentile from 70% to 62%. (Exhibit P-6)

23. The child’s scores on the KTEA in math applications demonstrated that between February 1998, when he was in second grade, and March 2001, when he was in fifth grade, his grade equivalency had increased from 2.0 to 9.8. Thus, during three years in the Board’s schools, he had a 7.8-year increase in grade equivalency during his first year at the private school, his grade equivalency regressed. (Exhibit, P-6)

The KTEA established that from February 1998 until March 2001, the child’s grade equivalency in spelling increased 1.7 years. During two years at the private school, however, the Student’s grade equivalency regressed by one full year. In the same three-year period of time in the LEA’s school, the KTEA showed that the his grade equivalency in reading comprehension had increased by 4.1 years. Between November 2001 and May 2003 at the School, the child’s comprehension had declined by 1.6 years. (Exhibit, P-6, P-8)

24. An IEP convened on June, 17, 2002 to discuss and plan for seventh grade, the 2002-2003 school year. The proposed goals and objectives, recommended a program which includes 9.5 hours per week of special education instruction, one hour of which was counseling, with the remainder of the education provided in the mainstream. The LEA, staff, present at meeting never worked with the child, never evaluated him or observed him at the private school, nor had anyone from the LEA even requested permission to do so to be prepared to offer an appropriate program. The parents requested placement by the LEA at the School for the 2002-2003 school year, the request was denied. (Testimony ,Parent, Testimony, Independent Psychologist, Testimony, Special Ed. Supervisor, B-49)

25. The child’s Language Training Report, dated June 11, 2003, states “Although he finds writing to be an arduous task, he showed great improvement this spring.” The June writing sample (B-55) is visibly better than the samples prepared in September, it contains misspelled

words, but the report states spelling is often the most difficult area to show improvement. The record does not contain writing sample from the time the child attended the LEA school therefore no conclusion is drawn about the improvement in writing after the child left the LEA program. The instructor appeared to have decided against any further attempts to improve his writing skills, adding in that same June 11, 2003 report: "For his last writing assignment, I let him dictate to me while I wrote on paper. No conclusions are made about the instructor's decisions regarding the child's writing program because the instructor was not called as a witness and could not be properly cross-examined on the meaning of the comments in the reports. The Language Instruction Report makes no reference to a decision, on the part of the instructor that writing was to be abandoned. The report clearly states the reason for dictation the is child's "Writing abilities do not reflect his intellect" (B-55 p.1) The private school instructor noted "that he learned how to use transition words (e.g. first, next, last)." The LEA points out, the child spelled "first" "forst" and "next" "nacst." Again the record is replete with comments of both the LEA's and the private school's inability to effectively remediate the child's spelling, therefore, no conclusions are drawn about the appropriateness of the program from the misspellings contained in the writing sample. As noted, the language-training instructor who was primarily responsible for assisting the child with his writing skills during the 2002-2003 year was not a certified teacher, had no degree in either special or regular education, was in her first year at the school, and had 90 hours of Orton-Gillingham training. Furthermore, his instructor for the 2003-2004 school year had almost identical experience and training. (Testimony, Academic Dean, Transcript, 1/14/04, pp. 42-43, 50-52, 71)

26. The Independent Psychologist, testified that the goals on the 2002-2003 IEP were too broad and combined skills that should be addressed separately in order to be appropriate. She further testified that the objectives that were supposed to break down the goals did not, nor did they in any way indicate how the goals would be achieved. (Exhibit B-49, Testimony of Independent Psychologist, Transcript, 7/14/03, pg. 32-38)

27. The section of the IEP which is designed to specifically spell out the services to be provided was also unclear. The service hours provided were to be supervised by a special education teacher, they were to be implemented by special education "staff," with no description as to the qualifications of that staff. Some services are to be provided in the classroom, some in a resource/related service room, and some in a self-contained classroom, yet none of these locations indicate how the services are provided. The Special Ed. Supervisor testified that a "self-contained classroom" could sometimes have one child in it, but that it could have as many as ten. (Testimony, Special Ed. Supervisor, Transcript, 3/5/04, pg. 22)

28. The location of the services provided was equally vague. The independent psychologist testified that the number of service hours outlined are not sufficient to address the child's needs, but that there was no indication of how those hours would be broken down across the week for the child. For example, the two hours of service dedicated to his academic resource and self-help per week could be broken down to under half an hour a day, which hardly seems sufficient given that four goals were to be addressed by this "service." (Testimony, Independent Psychologist, July 14, 2003, pg. 38-40, B-49)

29. The Special Education Supervisor testified that only one of the child's services in the 2003-2004, IEP, Reading/Language Arts, would be provided in a one to one situation by a certified special education teacher. She also testified that, out of 15.75 hours a week of service, this was the only time that the actual teaching instruction would occur. (Testimony, Special Ed. Supervisor, 3/5/04, Transcript, pg. 19-20, 84)

30. The parent's Independent Psychologist, evaluated the child in August, September and October of 2001, sometime after the March 2001 evaluation (B-41) conducted by the LEA. She reevaluated him on July 10, 2003. (Exhibit P-4, Testimony, Independent Psychologists, Transcript 7/14/03, p. 60)

31. While the child was attending his third year at the private school the Academic Dean stated that the school's own evaluations indicated he had not progressed in some areas and made minimal progress in others. He stated it sometimes took a student three years before they show significant progress. The School's Academic Dean expressed a belief that learning disabled students are best served by educating them only with other, similarly disabled children and asserted that the child should remain at the school. (Testimony, Academic Dean, Transcript 1/14/04 pp. 53, 66)

32. Witnesses state during the 2003-2004 year at the private school the child has done very well. His reading and writing have improved. His reading has improved such that "he can read street signs, which he never could before." His confidence has increased and he made gains socially and emotionally. He is more willing to take risks in the classroom and is developing skills in the his subject matter classes. "If you were to look at a piece of writing that he did when he was first in sixth grade versus a piece of writing he's doing now, there's a huge difference. He's able to put sentences together to make basic paragraphs. And when you look at his reading level he's able to decode words and he's beginning to develop a sight word vocabulary that's useful to him. Certainly it's a beginning step. ... But when you think about the fact that that progress occurred in two and a half years of very intense remediation and instruction ... I think without that, I can't imagine if any progress would exist." (Testimony, Parent, Testimony, Academic Dean, P-10)

33. The LEA counsel points out the reports contain reference to difficulties the child experienced, such as "great anguish," "arduous," "frustration," "struggle," resistant to almost all our activities," "confused" and "reluctant" when describing the child's attitude. His language-training instructors described his work as "incomplete," "inaccurate," "done with haste," "usually incomplete and poorly done." These comments in isolation are misleading, the reports speak for themselves they contain many positive comments about the child. (Exhibit B-50, B-55, P-10)

34. The Language Training Report, dated October 21, 2003, his private school instructor reports that the child "frequently arrives to our sessions with his homework incomplete." He expressed hope that the child would "understand how important language training is and become more cooperative and focused during our sessions." The records consistently report homework completion as a problem both in the LEA school and the private school. The reports speak for themselves. During the hearing the School's Academic Dean states despite the fact that the child fails to complete his homework, instructional sessions are very productive. On October 21,

2003, however, the child's initial 2003-2004 school year instructor reported that his failure to complete work "creates a dilemma as planned activities must be put on hold. The Assistive Technology tutor implemented strategies to rectify difficulty in completing homework. (Exhibit, B-55, P-9, P-10 p.1, Testimony, Academic Dean, Transcript, 1/14/04, p.2, 74) The Language Training Report, dated 11/26/03 states the child is a bright pleasant young man with a good sense of humor... our time together has been productive and engaging. His Assistive Technology instructor reports, I have enjoyed working with the child. The child had a fine term in Literature, he puts forth good effort. In History he is usually well prepared for class, his classroom behavior is outstanding and he shows a genuine interest in the material, his effort was strong and his attitude was always positive, he is a bright student and a pleasure to have in class. At the private school the child did not receive any counseling. (Exhibit, B-55, B-56 P-10, Testimony, Academic Dean, Trans. 1/14/04, pp. 40-41)

35. On June 29, 2001, the parents requested through counsel a Due Process hearing from the State of Connecticut Department of Education. (B-44). One of the issues listed in the hearing request was the LEA's purported failure to conduct a triennial evaluation. In fact, the Board had administered the child's triennial evaluation in March 2001. B-38-42. Consequently, the Student's next triennial evaluation was not due for another three years, March 2004. (Exhibit, B-38, Testimony, Special Ed. Supervisor 3/5/04, p. 16)

36. On June 17, 2002, the child's IEP team convened to plan the IEP for the 2002-2003 school year. At the meeting, the team developed an IEP for implementation at the LEA's middle school. The IEP consisted of goals in the area of decoding, encoding, written expression and self-advocacy and the PPT recommended 9.5 hours per week of special education services, an additional hour per week of counseling with the school psychologist, and approximately 23 separate modifications and adaptations for implementation in the regular classroom setting. (Exhibit B-49). At its June 17, 2002 meeting, the Team also agreed that "[u]pon receipt of parents' consent, [it would] conduct a reevaluation by school district personnel & review results of reevaluation at a PPT meeting by March 20, 2003."

37. The parents never provided consent for this reevaluation, the mother testifying almost a year later: "I didn't want the school to evaluate him again I didn't feel that they were competent enough to do a whole evaluation on [the Student]." (Testimony, Parent, 5/19/03)

38. On or before February 10, 2003, prior to the date by which the IEP had agreed to conduct the reevaluation, the parents requested the present Due Process hearing, seeking reimbursement for the 2002-2003 year. (Exhibit, B-54)

39. On October 15, 2003, the PPT convened another meeting, at which time it developed an IEP for implementation at the Board's middle school. The Team recommended that the Student receive 15.75 hours per week of special education instruction by special education teachers and an additional .5 hours per week of counseling from school personnel. (B-56) The Team recommended 33 modifications and adaptations for use in the regular classrooms as well as modifications on the Connecticut Mastery Tests. (Exhibit B-56, Testimony Special Ed. Supervisor)

40. The IEP team recommended that the Student return to the Board's middle school so that the Board could provide him with a multi-sensory, language-based reading program and with support in his mainstream classes. The IEP provided for the Student to receive 45 minutes a day in reading and language arts instruction on a one-to-one basis from a certified special education teacher who also is certified in reading. The IEP also provided for four hours a week of resource instruction in reading, spelling and writing skills and support for his mainstream classes, to be provided by the special education staff, most likely an aid. The child's program included the use of assistive technology, including the AlphaSmart program. (Special Ed. Supervisor, Test., 3/5/04, pp. 21, 54-55) The IEP recommended counseling to assist the child with his frustration regarding his language deficits. The language arts program derives from Orton-Gillingham, and is one of the reading methodologies that the LEA. The IEP recommends the child receive eight hours a week of special education assistance in his mainstream classes in order to assist him with the general curriculum. The child can use the Homework Club, which is provided four days a week after school and is staffed with either two special education teachers or a special education teacher and a special education tutor. The plan has four hour a year of Occupational Therapy consultations and four hours a year of Speech Pathologist consultations. (Testimony, Special Ed. Supervisor. 3/5/04)

41. The Board's middle school has three teachers who provide reading instruction. All are certified teachers, all three weeks of ongoing training from Elaine Cheeseman, an outside expert in reading instruction. One of these three reading teachers would have worked with the Student. (Testimony, Special Ed. Supervisor. 3/5/04)

42. During the hearing, the independent psychologist on cross-examination testified that the child would "benefit from enrichment artistically". But in terms of content areas . . . if he could just be exposed to some regular mainstream . . . regular social studies or science . . . I think that would probably be sufficient." The testimony elicited about the level of the child's giftedness, is he really gifted if his performance has dropped his I.Q is at 131, programming for giftedness is not written into the IEP document. (B-56) At the middle school, the Student would have been included in the school's Talented and Gifted program. The Board provides specialized programs in different skill areas of giftedness. It sounds as if there is an intent to substitute art enrichment for full participation in the gifted program, testimony is unclear on this point. (Exhibit, B-56, Testimony, Independent Psychologist, Transcript, 7/14/03, p. 51, Testimony, Special Education Supervisor, Transcript, 3/5/04, p. 56)

43. The child's June 17, 2002 IEP provided for him to receive 19.5 hours per week in regular education classes and his October 15, 2003 IEP provided for 22.25 hours per week with regular education classmates. (Exhibit, B-49 B56(15).

44. At the time of the IEP meeting, the Due Process hearing applied to the 2002-2003 school year it was not agreed to include the 2003-2004 school year until March 5, 2004. At the October 15, 2003 IEP meeting convened to plan the child 2003-2004 school year the team again requested at that the parents consent to the Board conducting a reevaluation by the Board's personnel. The parents declined consent because the parties were in the midst of the current Due Process hearing. (Exhibit, B-56, B-57, Testimony Dir of Pupil Services, Transcript, 3/5/04 p. 98)

45. The parents were not given an opportunity to discuss an appropriate program for the child for the 2003-2004 school year with the LEA prior to the start of the 2003-2004 school year. The LEA 2003-2004 school year began the last week of August, 2003. The LEA did not contact the parents regarding an IEP meeting to plan for the child for the 2003-2004 school year until late September 2003. The IEP meeting convened October 15, 2003. There is no claim by the LEA that the parents either refused or did not cooperate with them in scheduling an IEP meeting. (Testimony of Mother, Testimony, Special Education, Supervisor, Exhibit B-56)

46. At an IEP meeting on October 15, 2003 held to discuss and plan the child's eighth grade, the 2003-2004 school year. The LEA proposed goals and objectives which included a total of 15.75 hours a week of services, only 3.75 of which was to be actual direct reading instruction for the child. In the absence of an appropriate program and IEP being proposed by the LEA for eighth grade, the Parents requested that the child be placed at private school for the 2003-2004 school year, which request was denied. (Testimony, Parent, Testimony, Special Ed. Supervisor, B-56)

47. An Assistive Technology Evaluation, concluded October 24, 2003 was conducted because child had difficulty with reading, writing, and spelling. The evaluation assessed the child's handwriting, keyboarding skills, reading, and assessed the child ability to use several technologies, he tried a reading pen, software such as "Speaking Homework Wiz", WordSmith, Alpha-Smart, with Co-Writer Apple, Dragon Naturally, Speaking, Preferred, Books on Tape. The evaluator recommends, Dragon Naturally, Speaking, Preferred, WordSmith, text-to speech software, Speaking Homework Wiz, for a one-month trial, and practice touch typing. He will have assistive technology tutoring one-period a week, to train on the use of the technology, he will use, Speaking Homework Wiz, for a one-month trial at home. He will use study hall time to use the Dragon Naturally, Speaking, Preferred, to complete weekend homework assignments. The School will provide a special recorder for the books on tape supplied by Recording for the Blind and Dyslexic. The evaluation summarizes the child's performance using the different technologies, they are able to provide the child with significant advantages making learning much less time consuming and stressful. The implementation is meeting with success according to the Language Instruction Reports from November, 2003. (Exhibit P-9)

CONCLUSIONS OF LAW:

1. The student is identified as a student with disabilities pursuant to The Individuals with Disabilities Education Act 20 U.S.C. § 1401 (1997), (IDEA), 34 C.F.R. § 300.7(a) and Conn. Agencies Regs., § 10-76a-1(d). There is no dispute between the parties as to the child's eligibility for special education, they agree he is entitled to a free and appropriate public education.
2. The child attends a private school the parties reached a settlement agreement, placing the child in the school for the 2001-2002 school year. A dispute arose between the parties when the LEA proposed the child return to the LEA's program for the 2002-2003 school year. The parent's claim the LEA's program is inappropriate because it fails to provide the child with a free and appropriate public education.

3. Whether a program is inappropriate is determined by the two-prong test articulated in *The Bd. of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982). The first prong requires the LEA must follow the procedural requirements of IDEA. The Supreme Court notes emphasis on the procedural requirements of IDEA reflects a conviction that adequate compliance with the prescribed procedures would in most cases assure much if not all of what congress wished in the way of substantive content in an IEP, *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998) quoting *Rowley*, 458 U.S. 176, at 206. In the present case there is no dispute between the parties regarding procedural matters, for the 2002-2003 school year.
4. The second prong of *Rowley*, requires the individual education plan (“IEP”) offered by the LEA must be reasonably calculated to enable the child to receive an educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207, *Mrs. B. v. Milford Board of Education*, 103, F.3d 1114(2d Cir. 1997). Subsequent decisions elaborate on how much benefit is sufficient to be meaningful. The act requires educational *progress* rather than a program that is merely of benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 488 U.S. 1030 (1989) (Emphasis original). The IDEA was enacted to assure that all children with disabilities have available to them a free and appropriate public education which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction, *Rowley*, 458 U.S. 176, 188-189. The instruction must be at public expense and under public supervision, meet the States education standard, approximate the grade levels used in the State’s regular education program and comport with the child’s IEP, *Rowley*, 458 U.S. at 189. The IDEA does not require States to maximize the potential of handicapped children, *id.* at 197 n. 21, 102 S. Ct. 3034, but must be reasonably calculated to receive educational benefits, *M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Ed.*, 226 F.3d 60, 62 (2d Cir. 2000).
5. In order for FAPE to be offered, a school district must show, it complied with the statutory elements of an IEP; the goals and objectives in the IEP are reasonable, realistic and attainable, yet more than trivial and de minimus; and the special education and related services must be tailored to reasonably accomplish the goals in the IEP. *Board of Education of the County of Kanawha v. Michael M.*, Civil Action No. 2:99-0609, USDC for the Southern District of West Virginia (April 26, 2000) at pp. 18-19. Meaningful educational benefit for one child may be de minimus benefit for another. Since benefit is a relative term, courts have considered the potential of the student in deciding whether the IEP offered is appropriate, noting that “(w)hen students display considerable potential, IDEA requires ‘a great deal more than a negligible benefit’”, but instead “significant learning”. *Ridgewood Board of Education v. N.E.*, Case No. 98-6276, USCA for the 3rd Cir. 1999.
6. The regulations promulgated pursuant to IDEA, 20 U.S.C. § 1414 (a) (4), (a) (10) (B) provide the LEA as described in 34 C.F.R. § 300.2, shall provide special education and related services either directly by contract or through other arrangements. The LEA shall at the beginning of each school year have in effect for each child with a disability within its jurisdiction an IEP, 34 C.F. R. §300.342(a) (1). Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising the

IEP of a child with a disability. Each LEA shall ensure that the IEP team, review the child's IEP, no less than annually, to determine whether there is lack of progress towards the annual goals described in § 300.347(a), and in the general curriculum; or to address the results of reevaluations conducted under [the regulations]...and [review] information about the child, provided to or by the parents under § 300.533 (a)(1) or about the child's anticipated needs; or other matters, 34 C.F.R § 300.343(c) (1), (2) (ii) - (iv).

7. With regard to the 2002-2003 IEP the LEA demonstrated its ability to understand the needs of the child during his elementary years. He was student who progressed in the LEA's program until he left in September 2001. The LEA identified both the child's severe learning disability and his superior cognitive function, (as outlined in (P-5)). The IEP programs for grades three, four and five provide the child with an educational benefit, the objective criteria indicates the child progressed in several content areas, particularly in math (B-30, B-38). No analysis was offered to interpret the scores the child obtained on B-30 and B-38, however, the team comments in (P-5 p.21) the child could not do seventh or ninth grade math. The mother testified the scores were somewhat misleading, but no evidence was offered to challenge the scores. The child's progress is demonstrated by standardized testing. From September 1998, to March 2001, the KTEA evaluations demonstrate that in the span of 2.6 years, the child's instructional levels increased 8.2 years in math applications, 5.2 years in math computation, and 4.2 years in reading comprehension. Grade equivalency for spelling (3.5), reading/decoding(3.1) and reading comprehension (5.2) were less dramatic. (Exhibit, B-16, B-38) The objective evaluations show progress, but function is well below grade level in decoding and encoding but improved. The independent psychologist's evaluation (P-4) and the LEA's special education and gifted education staff, (P-5) stressed the importance of improving the child's severe deficits in reading, decoding and encoding if he is to be able to meet the challenges of the upper grades. It is clear by all accounts educating and remediating the deficits of this child is at the very least complicated. In fact, the private school the child now attends, which works exclusively with dyslexic students considers the child to be one of its most severely dyslexic students. The 2002-2003 IEP as described in (B-49) places the child in the mainstream for close to half of his school day, because the then current information contained partially in (P-5) indicates the child did not do well at that time in pull-out programs and contained classroom settings. The (B-49) program requires extensive coordination with the mainstream teacher, the child requires everything be read to him even his math curriculum and special education staff, the LEA proposes many (23) modifications to mainstream classes. As subject content increases in difficulty it will be very challenging to meet the child's needs.

8. Overall, the LEA adhered to the procedural requirements of IDEA for the 2002-2003 IEP. They demonstrated during the elementary years, they were able to plan a program in which both the child's remediation and gifted needs were addressed. The research on the gifted/learning disabled child showed the LEA understood the fine line between the focus on the child's strengths and focus on remediating his weaknesses. Access to rather recent triennial test results, March 2001, provided the LEA with information relevant to formulating a program for the child. During the time the child attended the elementary program, the team constantly revised and modified the program. When it was clear the child was not responsive to whole language instruction he was switched to other reading programs. When the child

faired poorly in the resource room and contained classroom components of the program, the LEA provided the child with assistance to allow him to remain in the mainstream with the special education teacher. The child received special education support and modification to permit him to participate in the T.A.G./gifted curriculum. Counseling is available in the LEA school. The child made demonstrated progress as confirmed by the standardized testing, in the LEA program. The standardized testing in the private school demonstrated decline in the testing results. The LEA program provided the child a program in the community with all the least restrictive environment considerations. The proposed program for seventh grade fell short in other respects. The 2002-2003 program, is better suited to elementary school and elementary school curriculum both the independent psychologist (P-4) and the research paper (P-5) cautions there is need for decoding and encoding remediation to meet upper grade curriculum. The program requires many modification and constant intervention both in the mainstream and the pullout portion. The team refused to consider an assistive technology evaluation. There is an increase in pull-out time and the child does not have the benefit of more seamless program available at the private school with a reading tutor in all of the subject matter classes. The standardized test results for reading and encoding are weak but show progress at the time the LEA proposed a program for the 2002-2003 school year. . The LEA program for 2002-2003 is approximately sixty-percent appropriate and forty-percent inappropriate. The strong standardized tests scores in the LEA program and the weaker scores in the private school cannot be ignored and are strong, objective criteria for concluding the LEA would have been able to provide an appropriate program for the child in 2002-2003, based on what the LEA knew about the child in March 2002.

9. The line of cases which provides for public school funding for education in private schools includes *Burlington v. Dept. of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 359 (1985). Public school funding of private education requires a finding that the program offered by the LEA does not provide a free and appropriate public education. The LEA has the burden of proving by a preponderance of the evidence that the child's program is appropriate, Conn. Agencies Reg. § 10-76h-14. In this case the LEA has established by a preponderance of the evidence that they could provide a FAPE to the child for the 2002-2003 school year. If the challenged IEP is adequate, as it was in 2002-2003, then there is no further inquiry.

10. It is not a foregone conclusion the program for 2003-2004, was likewise appropriate. Of primary importance is the claim the LEA had no program for the child at the start of the 2003-2004 school year. There was no IEP meeting convened to plan for the 2003-2004 school year. The LEA's 2003-2004 school year began the last week of August 2003. The LEA did not contact the parents regarding an IEP meeting to plan for the child until late September 2003. The IEP meeting convened October 15, 2003. There is no claim by the LEA that the parents either refused or did not cooperate with them in scheduling an IEP meeting. There is an LEA claim (not as an issue for hearing) the parents did not consent to an evaluation, the claim is addressed below. (Testimony of Mother, Testimony, Special Education, Supervisor, Exhibit, B-56)

11. The initial procedural inquiry is no mere formality. As the Supreme Court noted in *Rowley*, Congress' emphasis in IDEA "upon full participation of concerned parties throughout the development of the IEP," together with the requirement for federal approval of state and local plans, reflects a "conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 US at 206 (*Walczak v. Florida Union Free School District*, 142 F.3d 119 (2nd Cir. 1998.)) There are two procedural violations as the result of not planning a program for the 2003-2004 school year, the LEA did not convene an IEP meeting to plan for the 2003-2004 school year until October 15, 2003, well after the start of the 2003-2004 school year. 34 C.F. R. § 300.342 (a) provides, at the beginning of each school year the public agency shall have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F. R. § 300.343(c) (1) provides each public agency shall ensure the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP as appropriate to address any lack of expected progress towards goals and the results of any evaluations. To be clear it was the 2002-2003 IEP that was in dispute when the Due Process action commenced in February 2003. It was not until March 5, 2004, the parties agreed to add the dispute over the 2003-2004 IEP to the ongoing litigation.

12. The child began the 2003-2004 school year without an IEP, it is the responsibility of the LEA to invite the team. The LEA claims it provided the parents notice of its intent to reevaluate the child before March of 2003 (B-49). The LEA claims that the parties were involved in a Due Process action for the 2002-2003 does not impact evaluations that might have been pursued for the 2003-2004 school year. The testimony and evidence do not establish that the parent refused to consent to an evaluation request. The parents testified they never failed to cooperate with the LEA and there is nothing in the record to establish that there was a written request or even telephone contact to pursue the evaluation. The hearing record does not contain the "Notice for Consent to Reevaluate" that was issued around June 17, 2002. Exhibit B-49 states the LEA will conduct reevaluation upon receipt of consent ... for review in March 2003. The parent claims there was a delay in receiving the IEP document. They stated on the record 5/19/03 they did not believe the LEA was competent to conduct a whole evaluation of the child. The IDEA and its implementing regulations, has provisions to avoid the impasse that can occur when an LEA believes it requires information about the child and a parent refuses to consent. The hearing officer was not made aware there was a disagreement over the evaluation until it was argued in the post-trial briefs. There was no annual review of the child' IEP between June 17, 2002 and October 15, 2003 in violation of the IDEA requirement to review the child's program periodically, but not less than annually. Sixteen months elapsed between IEP reviews of the child's program.

13. 20 U.S.C. §1414(a)(1)(c)(ii) provides the LEA may pursue evaluation if the parent refuses to consent to the reevaluation by utilizing the mediation and due process procedures under section 1415 of this title, except to the extent it is inconsistent with State law relating to parental consent. State law does not bar the LEA's pursuit of evaluations. Both State and Federal law require only that the LEA must comply with the procedural safeguards outlined in 34 C.F.R. § 300.504 and the parental consent requirements of 34 C.F.R. § 300.505. The school year was in session approximately two months when the IEP for 2003-2004 was proposed on October 15, 2003. Thus the LEA has violated the procedural requirement of IDEA, if the first prong of *Rowley* is

violated then it is presumed the LEA has failed to provide FAPE to a child within its jurisdiction. Under the IDEA, a parent's right to reimbursement for a unilateral placement can be denied if "prior to the parents' removal of the child from the public school, the public agency informed the parents . . . of its intent to evaluate the child . . . but the parents did not make the child available for the evaluation."³⁴ C.F.R. § 300.403(d)(2). 20 U.S.C. § 1412(a)(10)(C)(ii) authorizes a hearing officer to order reimbursement to a parent of a child who previously received services from the LEA, if the hearing officer finds the agency did not make FAPE available to the child in a timely manner prior to the enrollment in the private placement. At the June 17, 2002 and October 15, 2003 IEP meetings, the LEA noted that it wished to reevaluate the child. The record is not clear that the LEA provided notice which complies with the act or that the parents failed to cooperate. The parents requested an Assistive Technology Evaluation (B-49) at the June 17, 2002, and the LEA refused to evaluate. It is not credible that the only reason the LEA did not provide a program for the start of the 2003-2004 school year was because the parents had not signed a consent for an evaluation in June 2002 for an evaluation to be completed before March, 2003.

14. Even if the procedural violations do not result in a denial of FAPE, the IEP proposed for the 2003-2004, might not be appropriate. In July 14, 2003, the child was evaluated by an independent psychologist who testified about her recent evaluation. The IEP provided the child would be spending four hours per week in subject support. There was to be 3.75 hours per week for the reading goal, which the evaluator believes is not sufficient for the child she believes he requires intensive focus on reading. She does not believe the direct services provided in B-56 direct services and in-class support for social studies and science is sufficient. The student will spend 22.5 hours per week in the mainstream, math will need to be highly modified for the student. Overall, she believes the child needs a program which concentrates on the reading basics because that is what is undermining his self-esteem, it is preventing him from reading text material, literature and it blocks him from moving forward. The evaluator believes assistive technology such as Kerzwire (transcript phonetic spelling) 3000 is preferred to the Alpha-Smart, which has a two-line read-out. She believes the child cannot rely on his reading skills for class content at the eighth grade level. The student is experiencing anger; his cooperation is coming down in notches. The evaluator believes he is building a protective wall around himself, he is defensive and she believes it is important for him to be highly motivated, to see his own progress, to feel that he is getting somewhere. I think he feels like he is not making progress. Work is hard for him, it is tiring and fatiguing, he is going to become lethargic and lose motivation. He can't visualize words long enough to get them on paper. He is becoming very frustrated and angry. (Transcript, 7/14/03, pp. 27-45). The 2003-2004 IEP was created after the IEP team had new and relevant information about the child that would indicate a plan to educate him more than fifty-percent of the time in the mainstream, is not appropriate. The parent requested an Assistive Technology Evaluation on June 17, 2002 the IEP team denied the request. The Independent Psychologist believes he needs this type of support. An Assistive Technology Evaluation was completed in October, 2003 it is recognized the report was not available to the IEP team at the time the IEP team met on October 15, 2003, but there was reason to suspect that a middle school child who couldn't read or write might benefit from an evaluation of technology to help him access grade level information and create grade level output. In fact the Special Education Supervisor testified the child would use Alpha-Smart and the Co-Writer software, technology that proved in testing to be inappropriate for the child. An Assistive Technology

Evaluation, concluded October 24, 2003 (P-9) was conducted because the child had difficulty with reading, writing, and spelling. The evaluation assessed the child's handwriting, keyboarding skills, reading, and the child's ability to use several technologies. He requires assistive technology tutoring one-period a week, to train on the use of the technology. AlphaSmart was assessed and found to slow the child's performance. The Assistive Technology Evaluation provides evidence about changes in the child's needs since the time he was a student in the LEA program. The Assistive Technology recommendations address long-standing issues of, homework, writing and access to higher level content.

15. The psychologist testimony is convincing, about needs of the child as he matured and the upper grade curriculum became more rigorous. She stressed the psychological impact of working hard and seeing little result. The IEP failed to provide for intellectually challenging material which had to be adapted to the child's 3-5th grade skill level as an eighth grader, he was getting closer to being a high school student than an elementary student. In the mainstream setting the 2003-2004 IEP, would not provide the focused, small group program the child required to maintain even minimal progress as he worked to increase his reading and writing proficiency. The Independent Psychologist testified 22.0 hours per week, in a mainstream classroom with the support of an aid, who had to implement classroom modifications, was not appropriate for the child. The curriculum modification required of a program for a student with reading and writing skills 3-5 years below grade level are a concern. The LEA had not observed the child in a classroom setting since June 2001, nor had they consulted with any of his teachers from June 2001 to October 15, 2003, the date of the IEP meeting. Any lack of current relevant information necessary to formulate an IEP for the child was as much or more due to the LEA's failure to follow the child in general. The IEP on October 15, 2003, was last reviewed at an IEP meeting 16 months prior. The team did not appear to consider the results of then current relevant information about the child that could have been available outside of formal testing.

16. Overall the IEP for the 2003-2004 year was more suitable for the child as they knew him to be in elementary school, with an elementary school curriculum. The heavy emphasis on reading and writing had the child teamed with an aid (not a reading instructor) for eight hours a week in the mainstream and four hours a week in resource room, with an additional 3.75 hours per week in resource room with a reading instructor. The staff had to implement 33 classroom modifications. The program was at best fragmented and failed to consider what if any transition would be necessary to bring the child back to the LEA program. To a large degree a finding the LEA provided an appropriate program was the result of their standardized testing which evidenced the progress the child was able to make in the LEA program. The testing is from 1998-2001. At some point in time it becomes too stale to carry much weight, even though it demonstrates progress. The IEP team failed to investigate or plan for effective assistive technology, which the team may have considered if they made a class observation or consultation with private school staff. The Independent Psychologist reported changes in the child as early as July 14, 2003, four months before the October 15, 2004 when the 2003-2004, IEP was proposed. If the procedural violations alone are not sufficient to render the IPE a denial of FAPE, together with the paragraphs other applicable paragraphs in the Conclusions of Law they are additional factors which contribute to make the IEP inappropriate. Failure to review the child's program periodically but at least annually, is written into the IDEA because it is an essential element of the act. The same applies to having an IEP in place at the beginning of each

school year, not because an IEP prepared on a specific date creates an appropriate plan and one written a day later makes is inappropriate, but because the planning is essential to having staff, materials, curriculum and modifications planned in advance of the time they will be required to be implemented.

17. Once a determination has been made that the LEA did not offer FAPE it must be determined whether the private school placement is appropriate. In selecting a unilateral placement, parents are not held to the same standards as are school systems. Since *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993), under the reauthorization of the IDEA in 1997, it is well settled that the unilateral placement does not have to meet the standards of a Least Restrictive Environment (LRE), nor even does the unilateral placement have to include certified instructors in special education, 34 CFR §300.403(c). It is stressed here that 34 CFR §300.403(c), not only requires a program be appropriate it requires that it be made in a timely manner, such is not the case when an IEP for a new school year is formulated two months after the start of the year. A case on point which cites various Circuit Court cases is *Norton School Committee v. Massachusetts Department of Education*, 768 F. Supp. 900 (D. Mass. 1991). It points out that the test for unilateral placement reimbursement may not be made in a vacuum. When a school district fails to meet its obligations in providing a FAPE for a child, the choice of parents left to their own devices and resources need not be a precise fit. The least restrictive environment guarantee ... cannot be applied to cure an otherwise inappropriate placement. The child has such severe learning disabilities combined with superior intelligence, the environment which provides reading tutorial in the LEA school is fragmented; and he is removed from LRE environment 7.75 hours per week. Standardized Tests (P-8) show progress particularly when measured against upper grade curriculum expectations. The assistive Technology tutorial shows promise of addressing long standing issues of written output and homework completion. The private school provides a program which is appropriate.

FINAL DECISION AND ORDER:

1. The local educational agency had an Individual Education Plan for the 2002-2003 school year that could provide the child with a free and appropriate education, the parents request for reimbursement is denied.
2. The local educational agency did not have an Individual Education Plan for the 2003-2004 school year that could provide the child with a free and appropriate education, the parents request for reimbursement is granted.