

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. New Fairfield Board of Education

Appearing for the Student:           The Parents, *Pro Se*

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Appearing Before:                   Hearing Officer Scott P. Myers, M.A. (Clinical  
Psychology), J.D.

**FINAL DECISION AND ORDER**

**ISSUES**

The following issues were identified at the Pre-Hearing Conference ("PHC"):

- 1) Does the individual education program ("IEP") proposed by the New Fairfield Board of Education (the "Board") at the June 2, 2003 Planning and Placement Team ("PPT") meeting for the Student for the 2003/2004 school year provide the Student with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") and, if not, what relief should be provided to the Student?
- 2) Was the Student entitled to receive extended school year ("ESY") services for the summer of 2003?
- 3) Did the Board violate procedural due process requirements in connection with PPTs convened for the Student in May and June of 2003 and, if so, what relief should be provided to the Student?

At the July 16, 2003 hearing, a fourth issue was added:

- 4) Are the Parents entitled to reimbursement for the evaluation done by Pioli Psychological Services ("PPS") in March 2003, reflected in a report (the "PPS Report") marked as exhibit B31?

At the July 24, 2003 hearing, two additional issues were identified:

- 5) Did the Board violate the Parents' due process procedural rights by withholding portions of the Student's records requested by the Parents in this hearing?
- 6) What is the Student's stay-put placement?

#### **SUMMARY OF FINAL DECISION**

- 1) With the modifications set forth herein, the IEP proposed by the Board for the 2003/2004 school year provides the Student with FAPE in the LRE.
- 2) The Student was not entitled to receive ESY services for the summer of 2003.
- 3) The Board did not violate procedural due process requirements in connection with the May 7, 2003 and June 2, 2003 PPTs.
- 4) The Parents are not entitled to reimbursement for the PPS evaluation or Report.
- 5) The Board did not violate the Parents' due process rights in connection with the request for records at issue.
- 6) The Student's stay-put placement is the placement and program reflected in the June 2, 2003 IEP.

**TABLE OF CONTENTS**

<b>Page</b>	<b>Section</b>
1	Issues
2	Summary of Final Decision
4	Procedural History
4	A.    Motions
6	B.    Board Exhibits
6	C.    Parent Exhibits
8	D.    Hearing Officer Exhibits
8	E.    Hearing Dates and Witness Testimony
9	Factual Background
9	General (1-60) <sup>1</sup>
22	The PPS Evaluation Results (61)
32	Planning for the 2003/2004 School Year (62-68)
41	Witness Testimony
41	Trina Shuptar (69-81)
43	John Pioli (82-96)
45	Marie Hopkins (97-104)
47	The Mother (105-134)
52	Susan Wiggins (135-152)
55	Mr. Dickau (153-176)
58	Conclusions of Law
59	General (1-21)
69	Substantive Challenges to the IEP Developed for the 2003/2004 School Year (22)
71	Alleged Procedural Violations with Respect to Development of the IEP (23-36)
75	Reimbursement for the PPS Evaluation (37-41)
76	Technical Deficiencies with the IEP (42-43)
77	ESY Services for the Summer of 2003 (44-46)
78	Issues Regarding Records Requested by the Parents (47-51)
79	Orders

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<sup>1</sup> These numbers correspond to the numbered paragraphs in this Section of the Decision.

## **PROCEDURAL HISTORY**

The Parents commenced this proceeding by request to the Department of Education dated June 14, 2003 and the PHC convened on June 23, 2003, at which the Board was represented by counsel and the Student by the Mother, appearing *pro se*.

### **A. Motions**

Over the course of this hearing, the parties submitted numerous requests and communications to the Hearing Officer raising a myriad of procedural, substantive and evidentiary issues.

#### **1. Board's Motion to Dismiss – Enforceability of the Settlement Agreement**

On June 23, 2003 the Board submitted a motion to dismiss this entire proceeding on the ground that the Parents were precluded from commencing a due process proceeding with respect to the 2003/2004 school year by virtue of a settlement agreement between the Parents and the Board executed in June 2002 (the "Settlement Agreement"). The Parents submitted a memorandum in opposition on June 23, 2003 and the Hearing Officer issued a ruling on July 1, 2003 granting the Board's motion in part. The Parent submitted a request for reconsideration of the July 1, 2003 Ruling on July 2, 2003, and the Board submitted an opposition to that request for reconsideration on July 3, 2003. On July 9, 2003, the Hearing Officer issued an order denying the request for reconsideration. The Parents submitted a renewed request for reconsideration and the Board objected to that request. At hearing on July 16, 2003, the Hearing Officer denied the Parents' renewed request for reconsideration. A written order was issued on August 8, 2003.

#### **2. Board's Motion to Dismiss – Enforceability of Settlement Agreement Related to Independent Educational Consultant**

In their request for due process (HO1) and at the PHC the Parents asserted a claim for breach of Paragraph 6 of the Settlement Agreement, which provided that the Board was to engage Susan Wiggins or another independent consultant to assist in developing the Student's educational program for the 2003/2004 school year. The Parents apparently believe that Ms. Wiggins is not an "independent consultant" or is biased in favor of the Board because she has been engaged in other capacities as well by the Board. On July 3, 2003, the Board submitted a motion to dismiss this claim on the ground that it was not subject to the Hearing Officer's jurisdiction and/or it was not ripe. On July 8, 2003 the Parents filed an opposition to that motion. When asked at hearing on July 16, 2003 to articulate the relief she was seeking on this claim, the Parent suggested abrogation of the Settlement Agreement or engagement of another independent consultant. The Hearing Officer advised the parties at hearing on July 16, 2003 that he has no jurisdiction over this particular claim, and granted the Board's motion. A written ruling was issued on August 8, 2003.

### **3. Parents' Objection to Board Witness List**

On July 9, 2003, the Parents filed an objection to the Board's witness list insofar as the Board identified as witnesses in this matter the Student, the Father and the Student's 8<sup>th</sup> grade teachers from Kildonan School. At hearing on July 16, 2003, the Hearing Officer advised the parties that objections to specific witnesses would be addressed if and when there was a need to do so, and no ruling on the Parents' objections to these witnesses was made.

### **4. Parents' Request for Reimbursement of Certain Costs**

As part of their exhibits, the Parents submitted a request for reimbursement (\$16) for the PPS Report, Dr. Pioli's testimony, Ms. Shuptar's testimony, the costs of preparing "transcripts" for the May and June 2003 PPTs (which were submitted as Parent exhibits) and other "administrative costs." At hearing on July 24, 2003, the Parents were advised that reimbursement for witness testimony, "transcript" preparation costs and "administrative costs" were beyond the Hearing Officer's jurisdiction to award, and that the Parents must obtain such relief, if it is available to them at all, from the District Court. The Parents were advised that reimbursement for the PPS Report was a matter within the Hearing Officer's jurisdiction, and that issue was added to the list of hearing issues.

### **5. Parents' Request for Transcript**

The Hearing Officer ordered that transcripts of the July 16, 2003 hearing be provided to the parties, and referred the Parent to the Department with respect to her request for a transcript of the July 24, 2003 and subsequent hearings.

### **6. Request to Supplement Trina Shuptar's Testimony**

After Ms. Shuptar had testified and been excused on July 16, 2003 hearing, by letter dated July 16, 2003, the Parents requested an opportunity to supplement Ms. Shuptar's testimony by including a letter from her as part of the evidentiary record. The Board objected. The Parent's request was denied orally at the July 24, 2003 hearing. A copy of the document proffered by the Parents was marked as Exhibit HO4 for identification.

### **7. Request for Order Determining Stay-Put Placement**

At the commencement of hearing, the Parent requested a ruling regarding the Student's stay-put placement. The initial hearing schedule, in the Hearing Officer's opinion, provided for the issuance of a Final Decision and Order in sufficient time to permit the parties to implement the placement ordered by the Hearing Officer or commence an appeal and seek a determination as to stay-put if necessary from the District Court. When it became clear that the initial schedule could not be met, the Hearing Officer concurred that it was necessary to issue a stay-put order, solicited memoranda of law from the parties and issued an order on August 8, 2003.

### **8. Extension of Date for Issuance of Final Decision and Order**

Due to the need for additional hearing dates, by order dated August 8, 2003 the initial date for issuance of the Final Decision and Order was extended from July 28, 2003 to and including August 21, 2003.

### **B. Board Exhibits**

On July 3, 2003, the Board submitted exhibits B1 through B34, totaling approximately 800 pages and apparently constituting its entire record for the Student from kindergarten to date. Absent objection by the Parent, all of these exhibits were admitted into the record at hearing on July 16, 2003 as business records for evidentiary purposes. The Parents noted that a page from B32 was missing, and by agreement it was added as page 20a of B32. The Board acknowledged that B28 was mislabeled in its index. At hearing on August 8, 2003, at the Hearing Officer's request, the Board supplemented its exhibits with B35, a packet of Notices regarding the June 2, 2003 PPT. B35 was admitted into evidence as a business record over the Parent's objection.

### **C. Parent Exhibits**

The Parent initially submitted sixteen exhibits (S1 through S16). These exhibits presented numerous evidentiary issues, resolved as follows on July 16, 2003.

Exhibits S1 (Parents' witness list), S6, 2-60<sup>2</sup> (the Student's records from Kildonan), S10 (material concerning the Kildonan School), S14 (notification of assignment of hearing officer by Department of Education and copy of June 14, 2003 request for hearing) and S15 (a letter from the Parents to Board personnel dated June 26, 2003) were admitted into the record as business records, absent objection by the Board.

Exhibits S2 ("Issues in Dispute"), S3 ("Supporting Evidence of Issues"), S4 ("Proposed Resolution of Issues"), S5 ("History of Academic Career") and S16 (request for reimbursement of certain costs as noted above) were all prepared by the Parents in connection with the hearing. By agreement of the parties at the July 16 hearing, these documents will collectively be treated as a memorandum of law and facts submitted by the Parents. The Parent was advised at hearing that, unlike with factual assertions in other exhibits that were being admitted into the record as business records, the factual assertions made in these documents would need to be proven at hearing.

Exhibit S6, page 1 was a summary of the Student's grades from the 8<sup>th</sup> and 9<sup>th</sup> grades prepared by the Parents for this hearing. By agreement, this document was admitted into the record subject to the understanding that if the data in it differed from the data in the source document, the data in the source document would control.

Exhibit S9, page 1-2 is a letter from Dr. Lane of Kildonan dated June 18, 2003 that was prepared in connection with this hearing. At the July 16 hearing, this document was marked for identification only pending the appearance of Dr. Lane as a witness.

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<sup>2</sup> A citation in this format means Student exhibit 6, at pages 2 through 60.

Exhibit S9, page 3 (a letter dated March 7, 2003 from Dr. Lane to the Parents), Exhibit S9, page 4 (a letter dated April 11, 2003 from Betsy Rodriguez, LMFT to the Parents), and Exhibit S9, page 5 (a letter dated June 19, 2003 from Mark Ligorski, MD to the Parents) were submitted to the May and/or June 2003 PPTs and form a portion of the record reviewed by those PPTs in formulating the Student's 2003/2004 IEP. Dr. Lane may be unavailable to testify and the Parents did not identify either Ms. Rodriguez or Dr. Ligorski as witnesses. Accordingly, the parties were advised at hearing on July 16, 2003 that absent the appearance of these individuals as testifying witnesses, these documents would be admitted into the record for the limited purpose of establishing the information that the Board had available to it when it was formulating the Student's 2003/2004 IEP but not for the truth of the matters asserted in these letters.

Exhibit S11 is described as a "transcript" of the June 2003 PPT and Exhibit S12 as a "transcript" of the May 2003 PPT. The Parent reported at the July 16 hearing that she had taped both PPTs, and had asked a paralegal to transcribe them. The Parent then reviewed the transcripts and made various corrections and added comments at the end. These "transcripts" were not prepared by a certified court reporter, however, and their accuracy is disputed by the Board. At the July 16, 2003 hearing it was agreed that the Parent would provide the original tapes of the PPTs, which would be marked as Parent exhibits, and that to the extent the Parent intended to use the "transcripts" to impeach the testimony of a witness, the "transcript" would be used by the Hearing Officer to locate that segment of the PPT on the tape recording which would be the evidence of the assertion being made by the Parents. Accordingly, Exhibits S11 and S12 were marked for identification only. At the August 8, 2003 hearing, the tape of the May 7, 2003 PPT was marked as S11A for identification only and the tapes of the June 2, 2003 PPT were marked as S12A, B and C. Each party initialed the tapes. At hearing on August 8, 2003, Mr. Dickau stated that he had reviewed the two transcripts and copies of the tapes of the PPT provided by the Parent and concluded that the transcripts are largely accurate, although there are gaps in the transcripts due to inaudible portions of the tape. The Board's counsel concurred. Based on testimony on August 8, 2003, and after notice to the parties, the Hearing Officer reviewed pages 86-103 of the June 2, 2003 PPT "transcript."

Exhibit S8 is a copy of certain documents used at the PPTs by the Parent, with handwritten notations by the Parent. The Parent explained that she was offering this document as evidence of what she recorded at the PPTs. The Board objected that this was not the best evidence of the assertions at issue. Accordingly, Exhibit S8 was marked for identification only.

At or subsequent to the July 24, 2003 hearing, the Parent submitted Exhibits S17 (a "brief" with supporting documents regarding a request for records made by the Parent on July 8, 2003); S18, at 1-9 (a "brief" supporting the Parents' arguments regarding the importance of Dr. Lane's June 18, 2003 letter, marked as S10); S18, at 10-20 (a packet of e-mail correspondence between the Parent and various individuals supporting the "brief" marked as S18; this packet was marked for identification only); and S20 (a "brief" regarding Dr. Pioli's testimony). Exhibits S17, S18 and S20 were not admitted as evidence, but rather are being treated as briefs. Exhibit S19 was marked for identification only.

**D. Hearing Officer Exhibits**

The Parent's June 12, 2003 letter to the Department requesting due process along with the Request for Impartial Special Education Hearing form completed by the Parents was marked as Exhibit HO1.

At the July 16 hearing, the Hearing Officer advised the parties that he was taking administrative notice of DSM-IV-TR pages 49-56 (concerning Learning Disorders), pages 85-93 (concerning Attention-Deficit /Hyperactivity Disorder or "ADHD") and pages 376-81 (concerning Dysthymic Disorder). These materials were marked as Exhibit HO2 and copies were given to both parties.

Susan Wiggins' curriculum vitae was marked as Exhibit HO3 by agreement.

A letter from Trina Shuptar seeking to supplement her testimony was marked as Exhibit HO4 by agreement.

**E. Hearing Dates and Witness Testimony**

Hearing convened on July 16 and 24 and August 8, 2003. At the July 16 hearing testimony was elicited from Trina Shuptar (the Student's treating clinical social worker), Susan Wiggins (an independent education consultant retained by the Board), and John Pioli, Ph.D. (a licensed clinical psychologist who wrote the PPS Report). Although Ms. Wiggins did not complete her testimony on July 16, the parties agreed on July 24 that there was no need for Ms. Wiggins to return to complete her testimony.

At the July 24, 2003 hearing, testimony was elicited from Ms. Hopkins (the Board's director of special education services) and the Parent. Both parties reported that other than Mr. Dickau, they had no other witnesses to offer.

At the August 8, 2003 hearing, the Parent completed her testimony and testimony was elicited from Mr. Dickau (who is responsible for coordinating special education services for the Board's secondary school students).

The Parent was accompanied and assisted at each hearing by a friend, whose son is also enrolled at Kildonan, who appeared to be familiar with substantive and procedural requirements of due process hearings and whose son's educational program was the subject of a recent decision by the Second Circuit Court of Appeals.

The evidentiary record was closed on August 8, 2003.



## **FACTUAL BACKGROUND**

The parties have disagreed regarding the Student's educational needs and programming for approximately 10 years. These disputes have not previously, however, been the subject of a decision on the merits issued by either a due process hearing officer of the Court. Although it is important to place the current dispute regarding the 2003/2004 school year into historical context, the Hearing Officer is reluctant to make unnecessary factual findings regarding these historical events. Accordingly, the discussion below should not be treated as Findings of Fact except to the extent specified in the Conclusions of Law Section.

## **GENERAL**

1. The Student attended kindergarten (1992-1993 school year) in the Board's schools. (B4)
2. While attending 1<sup>st</sup> grade (1993-1994 school year) in the Board's schools, the Student began acting out at school and at home, associated ostensibly with the birth of his younger sister and return of his father to work after an extended period of unemployment. A behavioral monitoring plan was implemented and by the end of the school year improvement was noted at home and at school. (B6)
3. According to the Mother, the Student's 1<sup>st</sup> grade teacher told her that the Student was a "behavioral monster." (Mother Test.; S5, at 1)<sup>3</sup>
4. In April 1995, while a 2<sup>nd</sup> grader (1994-1995 school year) at the Board's schools was referred for a consultation because although "capable" he was "poorly motivated," "immature overall," "easily distracted," "completes very little work on time," is "very disorganized" and "needs constant reminders to complete his work." The Parents and the Board disagreed over whether the Student should repeat the 2<sup>nd</sup> grade. Dissatisfied with their son's educational progress, the Parents considered enrolling the Student in a private parochial school (St. Gregory's). A reading screening performed by St. Gregory's in May 1995 showed the Student was performing at a Grade Equivalent (GE) 2.4. Testing by the Board showed a total reading level of 1.9 on the Woodcock Reading Mastery Test with above grade level performance on the Language Arts Performance Assessment. These results suggested an auditory processing weakness, reflected in weakness with reading and phonics skills. (B7)

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<sup>3</sup> Whether or not this event occurred as the Mother testified or has the significance that the Parents attribute to it in connection with this dispute, this event is purportedly the genesis of the Student's poor self-image and lack of self-confidence regarding his abilities as a Student. Although the Student was not present at this conversation, the Mother testified that he has been aware of being labeled by the Board's personnel as a "behavioral monster" since at least the end of the 1<sup>st</sup> grade. (Mother Test.)

5. The Board completed a psychological screening of the Student in June 1995 to support a placement decision for the 3<sup>rd</sup> grade. His performance on the Kaufman Brief Intelligence Test (KBIT) showed that he had the intellectual ability to complete school work at or above grade level. "If the KBIT scores are an accurate reflection of [the Student's] intellectual functioning level, there exists a significant discrepancy between his intellectual level and his current achievement level in reading." The evaluator (Mrs. Ferguson) noted that retention in 2<sup>nd</sup> grade would not address these problems, and recommended a behavioral contracting system to help him focus in class and re-evaluation in the Fall. (B7, at 13-16)
6. Based primarily on his mastery of the 2nd grade curriculum, the Board recommended advancement to the 3<sup>rd</sup> grade and placement in a collaborative classroom (taught by regular and special education teachers as a team). (B7)<sup>4</sup>
7. Dissatisfied with that recommendation, the Parents had the Student evaluated at the Gesell Institute in July 1995 which concluded that the Student was "developmentally young for his chronological age," that his academic skills were "more in keeping with his developmental age than his chronological age," that the Parents' decision to place him in 2<sup>nd</sup> grade rather than 3<sup>rd</sup> grade for the next academic year was an "appropriate match" for his developmental age, and that the Student should be evaluated by a behavioral optometrist and audiologist (for auditory processing). (B9, at 2-7; S5 at 1)
8. In July 1995, the Parents enrolled the Student in St. Gregory's to repeat 2<sup>nd</sup> grade. (B9)
9. In a letter to the Board dated August 2, 1995 voicing their concerns about the Board's handling of their son's education, the Parents advised the Board for the first time about the "behavioral monster" comment. (B9, at 158-59; Mother Test.)
10. During this period, a pediatric audiologist (B9, at 30-50) concluded that the Student's auditory system was immature and inefficient, resulting in auditory processing deficits which would manifest as difficulty following directions and poor tolerance for background sounds and noise.
11. A behavioral optometrist concluded that the Student is "severely far-sighted." (B9, at 18)
12. On August 22, 1995, the Parents commenced a due process proceeding alleging

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<sup>4</sup> The Parents now claim that they understood the procedure to be that the Student would be promoted to the 3<sup>rd</sup> grade at which time a complete evaluation would be performed and a decision would be made as to whether he should return to 2<sup>nd</sup> grade or remain in 3<sup>rd</sup> grade. (S5, at 1)

that the Board failed to identify the Student as eligible for special education services, to provide an appropriate educational program and to hold requested PPTs. (B9, at 161)

13. The Parents had the Student evaluated by Robert Kruger, Ph.D. in September 1995 who reported as follows: (B9, 10-15).
  - a. The Student did not manifest in the test sessions any of the behavioral difficulties that had been reported in school and was persistent and cooperative, although he had difficulty concentrating and attending.
  - b. The Student has “severe dyslexia,” “significant dyscalculia” and weak written expression relative to his overall intellectual ability. He shows “significant deficits in the acquisition of basic skills in reading, spelling, writing and mathematics” such that he is “significantly learning disabled” and would not be able to “keep up with even a second grade mainstream placement.”<sup>5</sup>
  - c. There is no evidence of an attention deficit disorder.
  - d. The Student’s behavioral difficulties at school were associated with the failure of the mainstream environment to address his learning problems. He requires “intensive special education instruction either in a small group (1 or 2 other students besides [the Student]) or a in a one:one setting . . . delivered on a daily basis for approximately [90 minutes].”
14. In January 1996, St. Gregory’s reported that the Student was working at grade level in all areas. The Student was receiving extra reading classes 3 times per week for approximately 30-45 minutes taught by a “Resource Teacher.” That program focused on word attack and comprehension skills. Improvement in reading and impulsive behavior noted. (B9, at 60)
15. Between September 1995 and February 1996, the Student received no special education services at St. Gregory’s and was in mainstream classes with the support noted above. (S5, at 2)

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<sup>5</sup> Cynthia Ferguson, a school psychologist, concluded that Dr. Kruger should have but did not administer projective tests, that Dr. Kruger used 3<sup>rd</sup> grade normative scores with the result that the Student’s performance on the academic achievement tests administered look further behind when compared to his intellectual quotient scores, and that comparing the Student to other beginning 2<sup>nd</sup> grade Students, his performance ranges from average to superior. Accordingly, Mrs. Ferguson opined that Dr. Kruger’s conclusion that the Student could not keep pace with a 2<sup>nd</sup> grade mainstream were not supported by the test data. (B9, 19-20) Ms. Ferguson evaluated the Student in June 1995, as noted in para. 6 above.

16. In February 1996, the Board and the Parents resolved their due process dispute by executing an agreement in which the Board agreed to provide the Student with tutoring by a “certified special education teacher” and to evaluate the Student before June 1996 to determine his eligibility for special education and related services for the 1996-1997 school year. (B9, at 69-71; S5, at 2)
17. Pursuant to that agreement, the Student was evaluated by Ms. Ferguson for the Board in April and May of 1996 with the following results reported (B9, at 85-94):
  - a. The Student’s overall cognitive ability, as measured by the Stanford-Binet, was within the average range, but the assessment was likely to underestimate his potential level of functioning because he was fatigued and lethargic during the testing and had not brought his glasses.
  - b. The Student’s scores on the Peabody Picture Vocabulary Test show intact receptive vocabulary skills.
  - c. The results of the Wechsler Individual Achievement Test (“WIAT”) showed that “Based upon [the Student’s] current level of intellectual functioning, his academic skills levels [on this assessment] are near or above expectations.”
  - d. With the exception of reading decoding, all of his achievement scores fall at or above age and grade expectations. He has made growth in all academic areas except for reading comprehension, in which his performance declined. Listening comprehension and oral expression are in the superior range, with age appropriate written expression skills.
  - e. Projective testing show no psychopathology and good ability to express his ideas and concerns with insight into what he sees as problems.
  - f. The Student “does not consistently apply his phonetic or sight word skills to decoding tasks but can do so more successfully when paced through a strategy slowly.”
  - g. The current profile does not support a learning disability in reading, language arts or math as previously suggested by Dr. Kruger. Given the lower than expected score on decoding, the Student would benefit from “narrowly focused instruction” in the area of decoding to teach him skills he could generalize to other areas.
18. On June 12, 1996, St. Gregory’s reported that the Student had made “good” academic and social growth but still had difficulty in reading comprehension and decoding. (B11, at 17)
19. At a PPT convened by the Board in June 1996, the Student was classified as learning disabled and eligible for special education services in the areas of reading

- decoding and encoding and writing. (B9, at 94-95) The IEP for the 1996-1997 school year provided for 1.5 hours/week of support services to be provided at the district, regardless of where the Student attended school.
20. The Student attended 3<sup>rd</sup> grade (1996-1997 school year) at St. Gregory's with special education support in reading decoding provided by the Board. (S5, at 2)
  21. On a March 1997 administration of the Iowa Tests of Basic Skills, the Student earned below average scores in reading comprehension (GE 2.4) and above average scores in arithmetic (GE 4.7 to 5.7). His remaining scores were at grade level. His Core Total score was also at grade level (GE 3.7). (B10, at 8; 21-22).
  22. A June 1997 administration of the Woodcock Johnson Reading Test showed the Student's "basic skills" were 1 year 1 month behind grade level with word attack skills 1 year 7 months behind grade level. (B10, at 6) The Student had shown one year's growth in decoding, although he was still behind grade level. (B 10 at 12)
  23. In June 1997, a PPT was convened to plan for the 1997/1998 school year. The Student was again identified as learning disabled and eligible to receive special education and related services, on the basis that achievement scores with respect to decoding/encoding were below expectations based on intellectual ability. There was some uncertainty as to his placement for the 1997/1998 school year at the time of the PPT, so alternative IEPs were developed. If the Student were to attend an in-district placement, the Student would participate in mainstream classes for 30 hours/week and receive 1.5 to 2.5 hours/week of special education support in all academic areas. If the Student were to attend St. Gregory's, the Student would receive 1.5 hours/week of special education support services to be provided by the Board at the Board's schools. (B10, at 1-5)
  24. The Parents returned the Student to the Board's schools for the 4<sup>th</sup> grade (1997/1998 school year), in part due to an increase in the class size at St. Gregory's to 32 students. (S5, at 2)
  25. On a September 1997 administration of the CMT, the Student mastered 2 of 3 objective clusters in written communication, 1 of 2 in listening comprehension and 1 of 3 in reading comprehension. He scored "well below" the statewide goal for holistic writing and below the statewide goal for reading, but at or above the statewide goal for mathematics. (B13, 10-11)
  26. A PPT was convened on February 27, 1998 at Parental request because of concerns with the Student's written language and reading skills. The PPT reviewed test data and classroom performance in reading which showed that the Student was working at grade level although problems with attention and impulsivity were noted. (B12, 2-9) No changes were made to his educational programming.

27. The Student attended 5<sup>th</sup> grade (1998/1999 school year) at the Board's schools. An IEP was developed on September 4, 1998, at which time the Student was again identified as eligible for special education and related services due to a specific learning disability. The IEP provided for mainstream placement with various accommodations and special education support for 2.5 hours/week, subject to review in February 1999. (B14, 2-10)
28. On an October 1998 administration of the Metropolitan Achievement Tests, the Student attained low average scores on the total reading component, average scores on the arithmetic component and low to middle average scores on the language component. His instructional reading level was grade 4, independent reading level grade 3 and frustration reading level grade 5. His "thinking skills" scores were in the average range for reading, mathematics and language. (B15)
29. On a February 1999 administration of the Woodcock Reading Mastery Test, the Student (then age 11 years 4 months and at grade level 5.5), showed below average (GE 4.1) word identification skills; average word attack skills (GE 3.2), average word comprehension skills (GE 5.4), below average passage comprehension (GE 3.7), a below average basic skill cluster score (GE 3.9) and an average reading comprehension cluster score (GE 4.6). (B14, at 40-45)
30. On a February 1999 administration of the WISC-III, the Student attained a VIQ of 118 (high average), a PIQ of 115 (average), an FSIQ of 118 (high average), a verbal comprehension cluster score of 118, a perceptual organization cluster score of 119, a freedom from distractibility score of 101 (average) and a processing speed 101 (average). (B14, 43-45)
31. A PPT was convened in February 1999 to review the Student's program in light of the test results. Various problems with reading, spelling and writing were noted, as were problems with rushing his work and carelessness. (B14, at 14-26) No changes were made to his programming.
32. Dissatisfied with the Student's academic performance and the Board's handling of the Student's educational program, the Parent placed the Student at the New Hope Christian Academy, a private parochial school, for the 6<sup>th</sup> grade (1999/2000 school year). He did not receive any special education services during the 6<sup>th</sup> grade. The class size was 16 students. (See S5, at 3)
33. The Student also attended New Hope Christian Academy in the 7<sup>th</sup> grade (2000/2001 school year), now in a class with 17 students and again without special education support. (S5, at 3)
34. The Mother testified that the Parents elected not to give the Student special education services in the 6<sup>th</sup> and 7<sup>th</sup> grades to give him a "break." She reported that he did well in the 6<sup>th</sup> grade, but his behavior and academic performance deteriorated in the 7<sup>th</sup> grade and he eventually "shut down" as a student while in

the 7<sup>th</sup> grade. (Mother Test.)

35. In November and December 2000, the Student was re-evaluated by Dr. Kruger, who reported the following results: (B17 2-8)
- a. The Student's "overall intellectual functioning was in the superior range with verbal skills in the high average range and nonverbal skills clearly in the superior range."
  - b. Assessment of academic skills reflected a pattern similar to that in his prior testing by Dr. Kruger. Reading decoding was "quite weak" and "well below" current grade placement. "Reading comprehension, by contrast, was considerably stronger and above current grade placement. These results indicate that [the Student] despite his decoding difficulty, is able to understand textual material and that his reading difficulties are not due to comprehension impairment."
  - c. The Student has a "profound impairment in phonological awareness skills which are most likely at the root of [the Student's] decoding difficulties."
  - d. "[S]pelling skills were quite, poor and reflected typical dyslexic errors such as letter omission, phonetic spelling and inventive spelling."
  - e. "Mathematic skills were variable" but overall were within the average range.
  - f. The Student has an attention deficit disorder characterized by distractibility, impulsivity and executive dysfunction.
  - g. The Student has a language processing disorder characterized by disnomia, some concreteness and difficulty in verbal inferential thinking and verbal problem solving.
  - h. Given the Student's age and "short time left for formal schooling (until he graduates from high school) [the Student] would probably benefit most from placement in educational environment designed to specialize in remediating and teaching children" who are "dyslexic, language disabled" but have "average to above average intellectual disability."
  - i. The Kildonan School is the specifically recommended placement.
  - j. "[I]f placement in an adequate and supportive environment does not take place quickly, [the Student] will lose interest in and motivation to perform academically . . . [H]is increasing frustration with school, without adequate placement now, will eventually lead to further behavioral difficulties and/or

withdrawal from school prior to graduating.”<sup>6</sup>

36. On February 20, 2001, the Board was provided a copy of Dr. Kruger’s December 2000 evaluation, and advised that based on Dr. Kruger’s recommendations the Parents would place the Student at Kildonan for the 2001/2002 school year and were requesting funding from the Board for that placement. (B17, at 1)
37. The Board convened a PPT on March 16, 2001 to review the Parents’ request for a placement at Kildonan. The PPT noted that the Student was not receiving any special education services at New Hope where he has been attending school. The Parents reported that the Student was having significant behavioral problems at New Hope, was in therapy with Trina Shuptar and was physically acting out in the home. The Student was described as having ADD and depression. The Board requested an opportunity to conduct testing. (B18)
38. An educational evaluation administered on April 12, 2001 showed that the Student (then 13 years old and in grade 7.8) performs in the high average range on the Broad Mathematics and average range in the Broad Reading and Broad Written Language tests of the Woodcock Johnson Psycho-Educational Battery – Revised (WJ-R) Tests of Achievement. These results mean that the Student will find the performance demands of age-level tasks involving Broad Mathematics “easy” and age level tasks involving Broad Reading and Broad Written Language “difficult.” (B20, at 18-19)
39. A speech and language evaluation performed on April 12, 2001 showed that the Student’s spoken “language functioning” and written expression functioning were within the normal range and that the Student did not manifest receptive or expressive language difficulties severe enough to classify him as language disordered or impaired. He showed some mechanical difficulties with his writing. (B20, at 21-22).
40. The Board also performed an observational assessment of the Student at New Hope in April 2001. The Student reportedly needed constant direction from the teacher to return to his seat, raise his hand and sit at his desk, was more interested in socializing and his peers than the lesson, was “unable” to perform self-directed tasks and was “constantly in motion.” The class room was noted to have “many distractions.” One of the observers concluded that New Hope was not meeting the Student’s needs and that he needs a structure environment with someone who can spend more time with him checking work in progress, breaking down tasks and assisting him with his schoolwork. (B20, at 23-24, 26-39)
41. During this period, the Student was acting out at school and in counseling with

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<sup>6</sup> Nowhere in his report does Dr. Kruger talk about the “behavioral monster” issue or the Student being depressed or suicidal.



Trina Shuptar, who reported that he was angry and explosive. (B20, at 28-29; S5, at 3)

42. A psychological evaluation was performed by S. Jabar for the Board in April 2001. The report (B20, at 31-38) includes a comprehensive review of all the assessments performed to date. Mr. Jabar concluded, based on a review of the Student’s history and his own testing, that:

- a. The Student is functioning at or near grade level but below his ability level in the area of reading.
- b. Although the Student has attended New Hope for the past two years and has not received any special education services, he made steady growth, as indicated by results of testing with the Woodcock Reading, Woodcock Johnson Achievement Battery and Wechsler Individual Achievement Tests:

Area	5 <sup>th</sup> Grade Board	7 <sup>th</sup> Grade Kruger	7 <sup>th</sup> Grade Gorman
Reading Comp.	4.6 GE	6.6 GE	6.5 GE
Math Total	8.5 GE	7.7 GE	10.5 GE
Writing	SS 100	SS 75	SS 101

- c. Dr. Kruger’s math results are clearly different from the other data and different from all of the teacher’s reports available in the file.
- d. The Student has made gains in the core academic areas, even though his special education and regular education programming has been “fragmented and inconsistent.”
- e. The Student’s learning profile is consistent with a specific learning disability in spelling (encoding and decoding) which affects his ability to read orally with the smoothness expected for his age and grade.
- f. His learning weaknesses also affect his ability to sustain his written language skills for prolonged assignments. This is partly due to difficulty with the task and the motivation to stay with it.
- g. Although the Student is reportedly exhibiting aggressive behavior at home, he is not at school and the assessment did not indicate “significant emotional issues interfering with the educational process.”
- h. The PPT should consider special education services for writing and encoding/decoding, a support period to develop compensation skills for spelling and written language, and instruction in a small group setting.
- i. Dr. Kruger’s recommendation for an outside placement at Kildonan is

“inappropriate at this time and is not in keeping with [LRE] guidelines.”

43. A central auditory processing (CAP) evaluation in June 2001 suggested an auditory integration deficit, with the result that the Student would have difficulty integrating auditory and visual functions and his performance on tasks such as taking dictation would be poor. “The effort to take notes in class can sometimes require such effort that the meaning of the lesson is missed or lost.” This deficit was also associated with phonological processing problems interfering with reading and spelling. The evaluator concluded that the Student’s auditory system is developing more slowly than average and may yet improve. (B19)
44. At a PPT convened on June 7, 2001, an in-district placement at the Board’s middle school was proposed for the 2001/2002 school year. (B20, at 1-17)
45. On July 1, 2001, the Parents placed the Student at the Kildonan summer program. Shortly thereafter, “all the aggression, frustration and severe depression started to disappear.” (S5, at 3-4)
46. By July 19, 2001, the Parents had commenced a due process proceeding (DOE 01-248). They alleged that the Board had failed to offer the Student an appropriate program for 2001/2002, to properly evaluate the Student, to offer ESY services for the summer of 2001, and to convene PPTs since the end of the 1998-1999 school year, and violated the Parents’ procedural due process rights. The Parents sought reimbursement for Dr. Kruger’s evaluation, for the CAP evaluation, for placement at Kildonan for the summer of 2001 and the 2001/2002 school year, and for compensatory education. (B21, at 6-7)
47. The Parents and the Board reached a settlement of their dispute on or by August 15, 2001. (B21, at 15-20; B26, at 1-4) That settlement agreement recited that the Parents have unilaterally placed the Student at Kildonan but that the Board maintains that his educational needs could be appropriately programmed for in the District and has offered such a program. Notwithstanding these recitals, the parties agreed that the Board would partially fund an educational program at Kildonan for the summer of 2001 and for the 2001/2002 school year or “until [the Student’s] withdrawal from the program, whichever occurs first.” It was agreed by both parties that that funding agreement was not an admission that the Student required such a program in order to make meaningful educational progress or an agreement regarding placement for any period beyond the 2001/2002 school year, but rather was an accommodation to the Parents. The parties agreed that the Student’s stay-put placement shall be the program offered in the June 7, 2001 IEP, and that the Board would in the Spring of 2002 reassess the Student’s circumstances to formulate a program for him for the 2002/2003 school year.
48. The Student attended Kildonan for the 8<sup>th</sup> grade (2001-2002 school year). As of April 2002, Kildonan reported that the Student had attained a 5<sup>th</sup> grade GE in spelling on the WRAT; a 6.4 GE in reading rate, a 4.7 GE in reading accuracy and

- a 5.4 GE in reading fluency on the Gray Oral Reading Test; and a 12.7 GE on reading comprehension on the Gates-MacGinitie. (B23 at 17)
49. Kildonan progress reports for the 2001/2002 school year indicate that for the better part of the year the Student manifested behavioral difficulties which interfered with his academic performance and frequently distracted peers in class. (S6 at 28-60) These problems diminished over time. The Student completed homework assignments, was enthusiastic and was, at times, a positive leader among his peers. His grades ranged from As to Cs.
  50. Pursuant to an agreement reached at an April 9, 2002 PPT, the Board assessed the Student with the WJR. (B22) When compared to others at his age level, his performance is average in Basic Reading Skills, Reading Comprehension and Written Expression and low average in Basic Writing Skills. (B23, at 19-20)
  51. At a May 8, 2002 PPT, the Board proposed a 9<sup>th</sup> grade placement at NFHS in mainstream classes with special education support, Orton Gillingham instructional methods and a transition plan to explore career options. (B22, at 3-15)
  52. On May 14, 2002, the Parents commenced a due process proceeding (DOE 02-120), alleging that the Board had failed to offer the Student an appropriate program for the 2002/2003 school year, including ESY for summer of 2002. The Parents sought reimbursement for a placement at Kildonan. (B1)
  53. On May 31, 2002, Kildonan recommended summer tutoring for the Student. (B25)
  54. In June 2002, the Parents and the Board resolved their dispute regarding the 2002/2003 and 2003/2004 school years by executing a Settlement Agreement. (B27) Among other things, the Settlement Agreement provided that the Board would fund a portion of the Student's placement at Kildonan for the 2002/2003 school year as an "accommodation" to the Parents, acknowledged that the parties disagreed over whether the May 8, 2002 IEP provided the Student with FAPE in the LRE, and provided that the Student's placement for the 2003/2004 school year would be NFHS.
  55. The Student was informed in June 2002 of the terms of the Settlement Agreement and was excited about attending NFHS in the 2003/2004 school year. (Mother Test.)
  56. Pursuant to the Settlement Agreement, the Student attended Kildonan in the 2002/2003 school year and did not receive any special education services from the Board. (Mother Test.; Dickau Test.)
  57. Kildonan progress reports for the period through November 27, 2002 (S6, at 21-27) include the following observations and comments:

- a. Algebra I: The Student had a “mixed term. While he understands the material, and is able to apply it, he often has trouble controlling himself in class, and handing in well done, completed assignments. His independent work is often sloppily done, and he often does not show the work for the problems, making it difficult to help show him where he went wrong. His class behavior is marked by two conflicting states: if he is not lethargic and attempting to fall asleep, he is often hyperactive and disturbing other members of the class. It was necessary to ask him to leave class on two occasions this term. When he is actively participating in a positive manner in class, he shows how well he understands the material.” (S6, at 22)
  - b. Global Studies: The Student’s “energy and good nature characterized his fall semester in Global Studies.” He thoroughly completed assignments and contributed to class discussions, but distracted his peers at times. (S6, at 23)
58. On December 4, 2002, Ms. Wiggins and Ms. Hopkins met with the Student at Kildonan. (Hopkins Test.; Wiggins Test.; Mother Test.) The Mother testified that this incident was the trigger for the Student’s problems which led the Parents to seek a continued placement at Kildonan for the 2003/2004 school year. The Mother testified that the visit led the Student to realize that he would be returning to New Fairfield Public Schools. (Mother Test.) At this time, the Parents and the Board were also embroiled in a dispute regarding educational programming for the Student’s sister. (S5, at 4) Due to the Student’s deteriorating emotional state, the Student “immediately” resumed counseling with Ms. Shuptar. (S5, at 4)
59. Kildonan progress reports following November 27, 2002 and through June 11, 2003 (S6, at 2-60) indicate that the Student’s behavioral problems (distracting other students and complying with class rules) continued but were not any more severe than in the prior term, and also indicate the following:
- a. December 20, Multi-Media class: The Student was a “whirlwind” this term, earning an A. (S6, at 20)
  - b. February 26, American Literature Class: The Student “participated well in class, regularly volunteering to answer open questions . . .” (S6, at 18)
  - c. February 26, Health and the Human Body: The Student “was an active participant in class discussions and always acted appropriately when sharing ideas and listening to others.” (S6, at 17)
  - d. February 26, Global Studies: The Student had “varied success this term. Although he completed most of his assignments and contributed to class discussions, he also disturbed the learning environment of the classroom too frequently.” (S6, at 16)

- e. February 26, Algebra I: The Student has a “so-so term in math this winter. His independent work was usually done well, but he had some difficulty submitting his assignments on time . . . He often needs to be reminded that his behavior is not appropriate in the classroom, and to stop distracting his classmates. In class he seems so confident of his abilities that he does not feel the need to pay attention, yet on the tests and quizzes his scores are indicative of incomplete mastery.” (S6, at 13)
- f. February 26, Language Tutoring: The Student has improved his efforts during the tutoring session and his ability to stay focused, but his independent work “often appears to have been completed in a rush.” (S6, at 12)
- g. April 23, Interim Report: Math assignments are usually poorly done, often late or not handed in at all; History: classroom behavior is disruptive. (S6, at 10)
- h. June 11, Multi-Media II: The Student “was a joy to have in this advanced class.” (S6, at 7)
- i. June 11, Global Studies: The Student “had a somewhat difficult spring term. His rather frequent disruptions of the learning environment of the class kept him from fully engaging in the course material. While his assignments showed a basic grasp of the course material, and oftentimes a unique approach, they were frequently submitted late and only partially completed.” (S6, at 6)
- j. June 11, Health and the Human Body: The Student is “a dedicated studier, who prepares for quizzes and tests with great care . . . He is an active participant in class discussion though often his tapping and fidgeting serve as a distraction to students and teacher alike.” (S6, at 5)
- k. June 11, American Literature: “Much like last term, [the Student] participate well in class, volunteering to answer open questions, explicating the text upon request. He was an enthusiastic participator for some of the class discussions, but he was able to restrain himself and be respectful of others . . . This term, the difficulty of his weekend assignments increased, and, impressively, so did the quality of work he did on them.” (S6, at 4)
- l. June 11, Algebra I: The Student “had another mediocre term in math this spring. While he occasionally showed some promise, and understood the material, he often chose to give up rather than to work harder . . . Although he complained that he could not understand what we were doing, his concerns were difficult to believe, as he was usually able to describe all the steps of a problem to me or to a classmate.” (S6, at 3)

- m. June 11, Language Training: “Though his attitude in class was always positive and energetic, his progress was somewhat hindered by his lack of enthusiasm for evening assignments. He often came to class without having completed his evening work and had few excuses beyond being tired.” (S6, at 2)
60. The Student’s final grades at Kildonan for the 2002/2003 school year ranged from A- to C+. (S6, at 1) His final grades in math and literature slipped from Bs to Cs from the 8th to 9th grade at Kildonan, while his history and science grades remained at the B level across both grades. (S6, at 1)

### **THE PPS EVALUATION RESULTS**

61. In March of 2003, the Parents had the Student evaluated by Liane Pioli, Ph.D. and John Pioli, Ph.D. (“Pioli Psychological Services” or “PPS”) for the purpose of “outlining [the Student’s] academic and emotional needs at the present time [to] present at [the Student’s] PPT and possible due process hearing aimed at deciding [the Student’s] school placement for the 2003-2004 academic year.” At that time, the Student was age 15 year 5 months and in the 9<sup>th</sup> grade. The 41 page long PPS Report (B-31) includes detailed information regarding prior assessments of the Students and the Student’s educational history and extension recommendations. Results, observations, conclusions and recommendations are as follows:
- a. PPS was told that the Student began attending Kildonan in the 8<sup>th</sup> grade and has been successful because of participation in a 1:1 daily language tutorial employing an Orton-Gillingham which targets his decoding, spelling, comprehension and expository writing needs. His classroom teachers are also trained in the Orton-Gillingham approach, which is used across settings at Kildonan. The Student is given additional time to take tests and complete assignments, and is in a “small calm class” with an average of 7-8 students. Although he had some behavioral problems when he entered Kildonan, those have since subsided. (B-31 at 5)
  - b. Based on a clinical interview with the Student, PPS notes: (i) that there were times when the Student needed directions repeated due primarily to “fluctuating attention,” but he otherwise was cooperative, participated and completed tasks presented to him; (ii) that the Student reported that his current antidepressant was “helping a little” but overall felt that the medications he had been on had not helped him; (iii) that the Student “expressed some frustration over his long and difficult history with school” and (iv) that the Student would like to “stay at his current placement as he needs the close attention and support” and has made some friends. (B-31 at 6-7)
  - c. Psychological testing is a “snapshot” of how a child is performing at the time of the test, and the results can be influenced by the child’s mood. (B-31 at 7)

- d. The Student “performs very differently at different times, even when tested with the same testing instrument,” as reflected in the following results (B-31 at 7-8):

<b>Date/By</b>	<b>Instrument</b>	<b>VIQ (VR)</b>	<b>PIQ (AR)</b>	<b>FSIQ (Composite)</b>
9/95 Kruger (Parent)	WISC-III	113	104	109
5/96 Ferguson (Board)	SB-IV	(101)	(95)	(96)
12/00 Kruger (Parent)	WISC-III	117	130	125
4/01 Jabar (Board)	WISC-III	118	115	118
3/03 PPS (Parent)	WISC-III	106	121	114

- e. The PPS intellectual assessment results are “an accurate reflection of his overall current intellectual functioning . . . although his potential level of functioning was felt to be a bit higher.” “One should assume that [the Student] has very high potential but . . . does not always display this potential” due to attentional and emotional factors that “limit the implementation of this potential into achievement.” (B-31 at 8)
- f. The Student “frequently” failed simpler items while correctly answering significantly more difficult problems. (B-31 at 8)
- g. The difference between the Student’s PPS VIQ and PIQ suggests a language based learning disability or left hemisphere developmental delay. (B-31 at 8)
- h. On the General Intellectual Ability (“GIA”) composite score of the Woodcock-Johnson III (“WJ-III”) Cognitive Battery, described by PPS as the single best predictor of overall school achievement and/or life outcomes that have a relationship to cognitive ability, the Student attained a score that was “somewhat below expectation” given his WISC-III FSIQ of 114. Students attaining a GIA score similar to the Student will show deficits in attention, fluidity, information retrieval, information processing speed, working memory and relative executive functions. (B-31 at 9)
- i. The Student attained a “High Average” score on a WJ-III composite factor

assessing comprehension-knowledge and/or crystallized intelligence. This factor measures the person's breadth and depth of language based knowledge learned through formal education and informal exposure/general life experiences, as well as the ability to verbally communicate that knowledge and to reason based on previously learned experiences. (B-31 at 9)

- j. The Student attained an "Average" score on a WJ-III composite factor assessing fluid intelligence and/or reasoning, a measure of the ability to reason, form concepts and solve problems using inductive and deductive reasoning, unfamiliar information or novel procedures. (B-31 at 9)
- k. The Student attained an average score on a WJ-III composite factor assessing thinking ability, or long term retrieval, visual-spatial thinking, auditory processing and fluid reasoning. (B-31 at 10)
- l. The Student earned a score significantly below what would be expected given his WISC-III FSIQ on a WJ-III composite factor assessing cognitive efficiency (the capacity of the cognitive system to process information automatically which facilitates complex cognitive functioning). (B-31 at 10)
- m. The Student earned a score significantly below what would be expected given his WISC-III FSIQ on a WJ-III composite factor assessing cognitive fluency (ease and speed by which an individual performs cognitive tasks). (B-31 at 10)
- n. "Typical of both ADD and depressive persons, [the Student] would demonstrate very good performance if he was interested in the task or challenged by it" and his "mood and energy fluctuations seemed to impact on his performance and are probably accountable for the variability on his testing over the years." (B-31 at 13)
- o. The Student attained "Average" scores on most of memory measures, with "Low Average" scores on a measure of "Attention/Concentration" and "Learning." (B-31 at 15-16) The results indicate that the Student is able to use the contextual meaning of a story to help him learn, but without a context he has a "marked impairment to learn new material" a result that will be associated with impairment in his "ability to memorize items out of context." (B-31 at 16)
- p. The Student's visual-motor integration skills are intact and on a normal developmental level. (B-31 at 17)
- q. In terms of perceptual processing and efficiency, the Student attained average scores on the Visual-Spatial Thinking and Auditory Processing clusters of the WJ-III. His processing speed score was "significantly below expectation given his WISC-III FSIQ." (B-31 at 17-18)
- r. "[D]ue to psychological factors" the Student did not "utilize speech and



language up to the level of his abilities.” He was reportedly tired, lethargic and withdrawn during testing. (B-31 at 18)

- s. “[P]honological awareness is essential for the acquisition of reading decoding and spelling skills,” and deficits in this area can limit reading ability. The Student attained an SS of 108 on the Phonemic Awareness Cluster of the WJ-III. On an assessment of lexical access (the ability to understand the process of learning to read and to retrieve phonological codes from a long term memory storage), the Student attained an SS 91. On a measure of auditory short-term memory (the ability to repeat numbers, words or sentences, the Student obtained an SS of 99. (B-31 at 18-19)
- t. On testing, the Student had “no difficulties with receptive language except for when he was distracted” which is consistent with Kildonan’s report that the Student has difficulty listening and taking notes at the same time. (B-31 at 19)
- u. PPS assessed the Student’s expressive language functioning through the Story Recall test of the CMS, on which the Student attained a superior score indicating that his ability to listen and recall meaningful memory is strongly developed “in a quiet environment.” (B-31 at 19)
- v. The Student’s score on the Oral Expression portion of the WIAT-II was in the average range and was “significantly above” his score on the Written Expression portion of the WIAT-II (B-31 at 19)
- w. Overall, PPS reached the following conclusions as to the “neuropsychological evaluation” results set forth above: The Student (then age 15.5 and in the 9th grade) processes information similarly to a child of Age Equivalent (“AE”) 11 years 11 months and GE 6.6; his processing speed is AE 11 years 7 months and GE 6.3; his cognitive fluency (ease with which he performs cognitive tasks) is AE 12 years 2 months and GE 7.1, and his working memory (ability to hold and store information immediate awareness) is AE 12 years 8 months and GE 7.2. His Executive Processes (ability to plan, set goals, control or inhibit his responses, sustain attention, demonstrate a “fluidity of concept shifting,” generate alternatives and demonstrate cognitive flexibility and “switching”) are “meaningfully weaker than would be expected for a person of [the Student’s] intellectual capabilities.” These weaknesses “in conjunction” with his ADHD and depression interfere with his ability to learn. These weaknesses are “intensified” by emotional stresses, self-esteem and a “general feeling of academic frustration” that the Student experiences. (B-31 at 19-20)

- x. The Student attained the following results on the WIAT-II (B-31 at 20):

<b>Subtest</b>	<b>GE</b>	<b>AE</b>
Word Reading	5.8	11:0
Reading Comprehension	9.5	15:0
Pseudoword Decoding	5.8	12:0
Numerical Operations	8.8	14:0
Math Reasoning	8.6	14:0
Spelling	5.8	11:0
Written Expression	6.2	11:8
Listening Comprehension	10.4	16:0
Oral Expression	12.9	17:0

- y. The Student's Cognitive Efficiency, Cognitive Fluency, Working Memory and Processing Speed results are "significantly discrepant" from his WISC-III PIQ of 121 and FSIQ of 114. These weaknesses affect the Student's ability to perform relatively automatic cognitive tasks quickly, accurately and efficiently. These areas can also be "seriously impaired by emotional influences such as a limited frustration tolerance, depression, anxiety, impulsivity, ADHD and other distracting emotional influences, particularly when measured under pressure to maintain focused attention." (B-31 at 21)
- z. The Student's Short-Term Memory, Working Memory and Delayed Visual Retention "are significantly discrepant from his WISC-III PIQ of 121 and FSIQ of 114" and, along with the weak scores on cognitive processing identified above, have various performance implications including difficulty with following directions, remembering information long enough to process it for understanding, listening to and comprehending a lengthy discourse, remembering a telephone number long enough to dial it, note taking in class, recalling sequences, immediate awareness, sequential processing, and auditory and/or visual attention. (B-31 at 22)
- aa. The Student's performance on various measures of Executive Functions such as Working Memory, ability to inhibit responses and sustain attention and concentration, and in cognitive switching are also "significantly discrepant from his WISC-III PIQ of 121 and FSIQ of 114." That weakness may be reflected, among other things, in difficulty using inductive and deductive reasoning strategies, flexibility in thinking, goal directed problem-solving, shifting strategies and adapting to changing conditions, inhibiting responses to irrelevant stimuli, and self-monitoring and self-regulation. (B-31 at 22-23)
- ab. Based on his WISC-III PIQ and FSIQ and his performance on various measures, PPS concludes that the Student has a specific learning disability in (i) Math, (ii) Reading and (iii) Written Language. (B-31 at 23-25)

- ac. The Brown Adolescent ADD Scales were completed by the Student, the Parents, by the Student's Kildonan literature and multimedia teacher ("Costa") and by his math teacher ("Flynn"). On the Brown Scales, a T score that is above 60 or below 40 is a significant difference indicating an area of "meaningful concern." A score of 65 or above is a "clinically significant indicator of the likelihood of ADD or related executive function dysfunction." (B-31 at 26) The results (B-31 at 26-30) are set forth below:

<b>Cluster:</b>	<b>Student</b>	<b>Parents</b>	<b>Flynn</b>	<b>Costa</b>	<b>PPS Conclusion</b>
Organizing and Activating for Work	65	74	60	50	Student has a high threshold for arousal and a high level of anxiety and disorganization; he has excessive difficulty getting started and procrastinates; he may feel overwhelmed by tasks that are manageable for him.
Sustaining Attention and Concentration	52	68	70	50	The Student does not perceive himself as having problems related to having his mind drift when listening, becoming easily sidetracked, being preoccupied with a fantasy life or his own thoughts, spacing out when reading or losing track of what was said. His Parents and one teacher do, however.
Sustaining Energy and Effort	55	81	70	50	His Parents and one teacher identify as a problem that the Student will take a long time to complete tasks and gets bogged down in them. The Student does not identify this as a problem for him.
Managing Affective Interference	55	70	58	50	This cluster elicits responses regarding moods and related aspects of social interaction that are often problematic for people with ADHD and executive function deficits. People with these problems can harbor feelings of being hurt and feel it deeply for a very long time, causing them to be defensive and to need constant reassurances from caregivers. The results indicate that this problem is manifesting only in the home and not at school.

Working Memory and Accessing Recall	50	91	55	50	This assesses forgetfulness in daily routines, such as forgetting to bring books and papers to and from school, difficulties in following routines, inability to recall what was learned the day before. Only the Parents perceive this to be a serious area of concern.
ADHD Combined Total Score	56	80	66	50	Scores above 55 indicate a “level of concern that would warrant an evaluation for the possibility of ADHD” and/or executive function deficit “by a medical professional.” Scores above 60 represent a very “serious concern.” The overall results indicate ADHD combined type, with the symptoms being viewed differently by different people in different situations.

- ad. To gauge how the Student views himself and his social standing, he was given the Culture Free Self Esteem Inventory, on which he identified significant concerns in the areas of: (i) quitting when his school work is too hard; (ii) his Parents being angry with him; (iii) not having fun with his parents; (iv) worrying; (v) not always telling the truth; and (vi) taking things from other people. (B-31 at 30)
- ae. To gauge how the Student views himself and his personal problems, he was given the Problems Checklist for Adolescents, on which he identified the following as areas of significant concern: (i) poor attitude towards school, being bored in school; (ii) school being too far from home; (iii) sibling rivalry and parental favoritism of younger sister; (iv) parental disapproval of clothes or appearance; (v) not getting along with other people; (vi) being tired and having no energy; and (vii) having poor eating habits. (B-31 at 20)
- af. The Parents’ responses to the Personal Problems Checklist for Adolescents indicate that they have the following significant concerns regarding the Student: (i) “feeling like people are against him” and being let down by friends; (ii) feeling depressed or sad, having trouble concentrating, not having good study habits; (iii) having a poor attitude toward self and family; (iv) arguing with his sister; and (v) worries about the family economic situation. (B-31 at 31)
- ag. The Student’s Parents and two teachers (Flynn and Costa) were asked to complete the Devereaux Scales of Mental Disorders (“DSMD”) which measures behaviors that reveal information about how a child relates to people and situations and which PPS claims is endorsed by the State as being the test of choice to use in making eligibility determinations for Social Emotional

Disturbance (“SED”). (B-31 at 31) A score of 60 or above is considered to be an area of “significant concern.” The results are as follows (B-31 at 31-33):

<b>Factor</b>	<b>Parents</b>	<b>Flynn</b>	<b>Costa</b>	<b>PPS Conclusion</b>
Conduct	69	52	51	A child who scores high on Externalizing might be considered to be aggressive, disobedient, annoying to others, disruptive, under controlled, restless or inattentive. The Parents identified this as a problem area and “rating him as having a close to significant problem.”
Delinquency	48	43	47	
Externalizing	59	47	49	
Anxiety	77	45	48	The Parents, but not school personnel, perceive the Student as having significant problems with Anxiety, Depression and Internalizing, seeing the Student as worrying excessively, withdrawn socially, inhibiting his responses, and being depressed.
Depression	69	48	46	
Internalizing	77	46	47	
Autism	44	52	52	Neither the Parents nor the school identify the Student as having severe disturbances.
Acute Problems	44	44	46	
Critical Pathology	43	48	49	
Total	60	48	48	
				The Parents perceive the Student as having “a significant level of difficulties,” but school personnel do not.

- ah. Based on these results, “it is very clear that the symptoms that [the Student] displays in a school based setting are markedly different than the behaviors that he displays at home.” (B-31 at 33)
- ai. On the MMPI-A, the Student manifested a “very defensive test-taking attitude” in approaching the test, and the results suggest that it is “very important to [him] that others perceive him as having an appearance of adequacy, effectiveness and control.” Others are apt to describe him as “stubborn and inflexible when he makes up his mind.” (B-31 at 33-34)
- aj. Projective testing results indicate that the Student is “somewhat emotionally immature for a person of his age and his high intellect.” (B-31 at 34)
- ak. When the Student is feeling sad or depressed, he “may verbally deny these emotions” but will display depressive equivalents such as lethargy, difficulty

in focusing and concentrating, irritability, tiredness, fatigue, sleeping difficulties, headaches, stomachaches, moodiness, withdrawal, social isolation and oppositional tendencies. (B-31 at 34)

- al. The Student meets the criteria under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) for: Attention Deficit Disorder, Combined Type (314.01); Dysthymic Disorder (300.4); Learning Disorder Not Otherwise Specified (short-term memory and long term retrieval problems in verbal areas) (315.9); Learning Disorder Not Otherwise Specified (processing speed disorder) (315.9); Mathematics Disorder (315.1); Disorder of Written Expression (315.2); and Reading Disorder (315.00). (B31, at 35)
- am. The PPT should consider eligibility for special education and related services under an Other Health Impaired (OHI) for ADHD; and Specific Learning Disabilities in Math, Written Expression and Reading. (B31, at 35)
- an. The Student has a “complex combination of learning, attentional and emotional problems” which “subtly interact with each other in an unusual manner” with the result that the Student “*is functioning very much below his potential on standardized tests.*” (B31, at 35; emphasis added.)
- ao. Reviewing the prior and current evaluations suggests that the Student is a “highly intelligent young man who has been turned off to school and who has not learned to identify himself as a student. An academic setting that allows him to do this, and that will address his complex array of problems will help him to rise up to his potential, and will ameliorate the insidious depression that is slowly building and becoming chronic.” (B31, at 35-36)
- ap. “Overall, [the Student] appears to be functioning *at his best* this year at the Kildonan School.” (B31, at 36; emphasis added.) “The Kildonan School appears to more than adequately provide [the] individual attention to each of its students” of the type the Student needs to “remediate the academic deficiencies” that the Student has with organization, completing assignments and development of study skills. (B31 at 41)
- aq. “The original request for this evaluation was to assist [the Parents] in the *best education placement* for their son.” (B31 at 41; emphasis added.)
- ar. In determining a placement for the Student, various factors need to be kept in mind: The Student has been in several schools and “another switch and adjustment will not be in his best interest.” The Student has made “significant progress” at Kildonan and PPS has “concerns about [the Student’s] emotional stability if a switch in schools is made, as he has expressed a positive attitude toward [Kildonan] and a *fear that he will not do well if he has to again switch schools.*” Given that his dyslexia and phonological difficulties have not been addressed adequately previously, “he

requires the more intensive educational setting and specialized curriculum that he is currently receiving at Kildonan.” (B31 at 41; emphasis added.)

- as. Among others, PPS recommends the following classroom accommodations and strategies (B31 at 36-39):
- (1) To address the Student’s processing difficulties and his ADHD, implement accommodations typically made for a person with a hearing impairment or a Central Auditory Processing Disorder. (B31 at 37)
  - (2) Allow untimed testing to address his problems with information processing, organization and retrieval problems, which cause him to work at a slower pace and reduce the anxiety the Student might experience in trying to perform under timed conditions. (B31 at 38)
  - (3) Utilize learning strategies which develop and improve his metacognitive thinking skills (the process of learning how to think). Develop problem solving skills, inferential and abstract reasoning skills, self-questioning techniques, learning to separate relevant from irrelevant information, categorizing and prioritizing information, planning and predicting outcomes. (B31 at 39)
  - (4) Use mnemonic strategies, chunking of information and multisensory learning strategies. (B31 at 39)
  - (5) In class and homework assignments should have specific step by step instructions on how the task is to be completed and what it is supposed to look like when it is completed. (B31 at 39)
  - (6) Provide the Student with a quiet and uncluttered working environment. (B31 at 39)
  - (7) Allow the Student to use a word processor to complete his work. Consider use of a laptop. (B31 at 39)
  - (8) Since the Student cannot “think and write” at the same time, it is unrealistic to expect he can take accurate and precise notes in class, a problem that will intensify as he progresses through school. The Student should be given an outline or transcript of the class lecture or a photocopy of the notes of a student who is considered an excellent note taker. (B31 at 40)
  - (9) Due to his learning and emotional difficulties, the Student is susceptible to rejection by his peers for inappropriate behavior. It would be useful for the Student in any individual therapy or social

group in school to review how his behavior impacts others. (B31 at 40)

- (10) The Student could profit from having an adult figure in his school environment who could act as a mentor for him, such as a guidance counselor, a social worker or a school psychologist. This person should not be responsible for any direct teaching or instruction of the Student. (B31 at 40)
- (11) The Student “clearly needs” the help of a tutor to assist him in organizing his work, completing assignments and to help him to develop the type of strong study skills that he will need as he progresses on with his education. (B31 at 41)
- (12) PPS identifies approximately 45 specific suggested accommodations, teaching strategies or approaches to use to address specific educational issues. Among other things, PPS recommends assessment of the Student’s performance on reading, spelling, writing and arithmetic to determine his basic skills; review his performance on timed vs untimed writing assignments to determine if removal of all time constraints increases the quantity and quality of his writing; provide daily practice in writing and spelling assignments; and decrease the demands of reading assignments. (B31, at 36-38)

#### **PLANNING FOR THE 2003/2004 SCHOOL YEAR**

62. A PPT was convened on May 7, 2003 to begin the process of planning the Student’s educational program for the 2003/2004 school year. That PPT lasted approximately 1.5 hours and was continued until June 2, 2003, in substantial part because the Parent had provided a version of the PPS Report which had assumed that the parties were engaged in due process and a decision was made to wait until a “corrected” copy of the PPS Report was presented for review. (Mother Test.; Hopkins Test.; Dickau Test.)
63. By letter dated May 27, 2003, Dr. Lane (Kildonan’s Academic Dean) advised that the Student’s daily 1:1 Orton Gillingham tutorial sessions have enabled him to make gains in decoding, reading fluency, comprehension and expository writing, but that if “he does not continue to work on the skills he has developed in those areas, as well as spelling, he will likely lose ground.” “[T]o prevent any regression,” Dr. Lane recommended 3-4 hours/week of 1:1 language training during the summer provided by an Orton-Gillingham professional. (B32 at 26)
64. In a letter dated May 28, 2003, Trina Shuptar reported that the Student has been her patient “intermittently for the past 3 years” and “returned to active treatment this past winter with symptoms of anxiety and depression” which Shuptar opines were a “manifestation of feelings he was having about having to leave Kildonan



School where he has finally felt understood in terms of his significant dyslexia.” While at Kildonan, he “did not need to be in active treatment . . . as he was doing so well.” Currently, the Student “has been in anticipation of a contract designated by New Fairfield Schools that he will have to return to public schools where had had a terrible educational experience when he was younger.” Ms. Shuptar concludes that “[a]t this time, the only way to relieve this child of these recurring symptoms is to allow him to remain in Kildonan where he has thrived both educationally and emotionally.” Ms. Shuptar opines that the Student will regress if his “current situation . . . is disrupted.” (B32 at 27)

65. The June 2, 2003 PPT lasted for 3.25 hours. (Dickau Test.) The minutes (B32) indicate the following:
- a. The attendees included Mr. Dickau (administrator designee), the Parent, Ms. Lalley (a regular education teacher); Ms. Gawlack (a special education teacher), Mr. Cooney (the school psychologist), Mr. Locascio (the school social worker), Ms. Sulzmann (speech and language), Ms. Wiggins (independent consultant retained per Settlement Agreement), Mr. Durham (administrator coordinator for secondary student services), and Mr. Murphy (Board attorney). (B32 at 1)
  - b. Dr. Lane did not participate in the June 2, 2003 PPT. (B32 at 1)
  - c. The Student is eligible to receive special education and related services on the basis of a specific learning disability. (B32 at 1)
  - d. The LRE for the Student for the 2003/2004 school year is NFHS with the program as set forth in the June 2, 2003 IEP. (B32 at 2)
  - e. That the Student’s educational program include special education directed study and reading as well as support in mainstream classes. (B32 at 2)
  - f. That informal mathematics assessment/testing be utilized to determine mathematics placement in consultation with Kildonan personnel. (B32 at 2)
  - g. That the Orton-Gillingham method be utilized in the Student’s reading class. (B32 at 2)
  - h. That the Student’s progress be review quarterly with participation by the Parents, the staff and Ms. Wiggins. (B32 at 2)
  - i. That a meeting be convened early in the 2003/2004 school year to “introduce [the Student’s] reading needs and modifications.” (B32 at 3)
  - j. “That appropriate counseling personnel be made available to [the Student], i.e., school counselor, school psychologist or social worker, to assist as

- mentor with is educational needs and transition adjustments to NHFS.” (B32 at 3)
- k. “That appropriate programming, accommodations or modifications or adjustment be an ongoing process to be implemented as necessary during the school year. A PPT will be held as necessary to consider these changes.” (B32 at 3)
  - l. Speech and language therapy will be conducted twice weekly in special education reading. (B32 at 3)
  - m. “Recommendations as presented by [the Parent] are accepted only as stated in the IEP at pages 3-8.” (B32 at 3)
  - n. The PPT refused the Parents’ request for continued placement at Kildonan for the 2003/2004 school year. (B32 at 4)
  - o. The request for a summer Orton-Gillingham reading program was rejected. (B32 at 4) “No documented proof indicates regression/recoupment may occur based on the severity of the Student’s disability. (B32 at 4)
  - p. All previous district testing indicates that the Student can receive an appropriate education at NFHS. (B32 at 4)
  - q. The PPT reviewed and considered the PPS Report and declined the Parents’ request for reimbursement. (B32 at 4-5)
  - r. The district has “appropriate personnel available to address counseling needs at school as they apply to educational program.” The PPT denied the Parents’ request to fund counseling with Shuptar. (B32 at 5)
  - s. In evaluating the Student’s “present levels of educational performance” the PPT noted the following (B32 at 6):
    - (1) As to “health and development:” The Student has been diagnosed with ADHD, a central auditory processing deficit, and depression for which he is taking medications.
    - (2) As to academic/cognitive areas: The Student is progressing well at Kildonan with difficulties in mathematics and an Orton-Gillingham approach for his reading difficulties.
    - (3) As to social/behavioral areas: The Student is “sensitive, in outside therapy for depression; impulsivity and distractability in some circumstances.

- (4) As to motor areas: The Student was age appropriate.
  - (5) As to communication areas: The Student was noted to have difficulty with writing fluency due to limited mastery of spelling, punctuation and capitalization. The Student has “good ability to formulate ideas and commit them to paper and oral discussion.”
  - (6) As to vocational interests: The Student is interested in visual graphics and communications.
  - (7) The Student’s identified strengths were: memory, technology, flexibility with language, higher level thinking, analysis of literary text, self-confidence and self-esteem and adult interactions.
  - (8) Identified “concerns/needs” were math, spelling which inhibits writing, impulsivity and distractability which effects behavior, needs concrete examples and samples in math, and level of frustration.
  - (9) The PPT determined that the Student’s disabilities affected his progress in the general curriculum as follows: His spelling, punctuation and capitalization impact on his ability to progress in the general educational curriculum. His reading difficulties without supportive special education and classroom behaviors hamper his academic progress and achievement.
- t. The PPT considered transition service needs and proposed that the Student select courses appropriate to his goals, and explore college testing and post-secondary educational and career opportunities. (B32 at 13)
  - u. The Student’s program for the 2003/2004 school year would include 3.57 hours/week of directed study provided by special education staff in a resource room setting, 3.57 hours/week of special education reading support provided in a resource room setting, and counseling as needed. The Student will spend 26.46 hours/week with peers in mainstream settings. (B32 at 14)
  - v. The Student will take the CAPT at the 10<sup>th</sup> grade level (on level) for Math, Reading for Information/Response to Literature and Interdisciplinary Writing/Editing and Revising. The Student will take the CAPT Science component out of level. The Student will be permitted to take all aspects of the CAPT with extended time and in a non-standard test setting. (B32 at 16)
  - w. Goal # 1 of the IEP was for the Student to improve his language arts skills by: Objective 1 – maintaining a skeletal student notebook that includes presentation of sounds and principles, syllabication, application and review; Objective 2 – increase fluency and automaticity of skill (reading and writing); Objective 3 – proofread and revise written work for clarity,

elaboration and mechanics: punctuation, spelling and capitalization; and Objective 4 – apply phonetic and structural analysis to words in context including Latin roots. (B32 at 7-8) The evaluation procedures for these objectives were pre- and post-baseline data, work samples/job performance/products, and achievement of objectives. The performance criteria were successful completion of the task/activity and “improvement.”

- x. Goal # 2 of the IEP was for the Student to “achieve success in all classes” by attaining grades of C or better, to be accomplished by: Objective 1 – maintain and use an assignment pad and calendar to plan for timely completion of assignments; Objective 2 – recognize when he needs help and seek assistance when needed; Objective 3 – Bring necessary materials to class and cooperate with academic assistance; and Objective 4 – Communicate with case coordinator and teachers regarding the need for use of modifications. The Student’s progress in these areas would be based on work samples/job performance/products, achievement of objectives and teacher observations/reports. The performance criteria were identified as passing grades/scores and successful completion of task/activity. (B32 at 9-10)
- y. Goal # 3 of the IEP was planning for post-secondary education and employment, to be accomplished by: Objective 1 -- Completion of a career interest inventory and researching a career of interest; Objective 2 – Meetings with the case coordinator, family and guidance to plan courses and activities related to areas of interest; and Objective 3 – Take the PSAT. The evaluation procedure for this goal was achievement of objectives and observation. The performance criteria were successful completion of the task/activity. (B32 at 11)
- z. Goal # 4: The Student will develop positive coping strategies to reduce frustration, to be accomplished by: Objective 1 - The Student will identify academic stressors and label them with feelings more frequently; Objective 2 – the Student will seek help from others as a way of reducing his academic frustration; and Objective 3 – the Student will begin to perform objectives 1 and 2 independently. The evaluation procedure for this goal is teacher observation, with performance criteria for progress identified as “percent of change.” (B32 at 12)
- aa. The June 2, 2003 PPT minutes include a document prepared by the Parents for the PPT entitled “A Portrait of [the Student].” (B32 at 18-20a) Much of this “Portrait” repeats or is based on observations from the PPS evaluation. Among other things, the Portrait:
  - (1) Reports a Parental concern that the Student has a serious deficit in social skills that will impact him at home, school and work, and that unless his teachers are “properly trained to sort out behavior that results

from an incompetency related to his disability rather than view all misbehavior as noncompliance” the Student will take a “serious downward spiral.”

- (2) Identifies the Student’s learning disabilities and lists approximately 70 specific weaknesses associated with those learning disabilities.
  - (3) Identifies 27 Student strengths, including “superior logical thought processes,” “abstract reasoning skills” and “perceptual abilities.”
- ab. The June 2, 2003 PPT minutes include an observation report prepared by Ms. Wiggins of the Student while at Kildonan on May 2, 2003. (B32, at 21-22) The report notes the following, among other things:
- (1) The Student participated appropriately in a Global Studies class given in a lecture style format, evidenced appropriate interest and comprehension, and was able to take notes of the lecture by copying notes being written by the teacher as he lectured. Some mechanics difficulties with handwriting were noted, due to what the Student reported as hand cramping. The Student was noted to be missing materials and to have lost his concentration momentarily. The teacher reported that the history book is not on tape, that the Student does not use a laptop in class or generate much of his homework by key boarding, that the teacher can read the Student’s handwriting, and that the teacher “sometimes scribes for [the Student] during tests because [the Student] knows so much more information than he elaborates on his own writing” due in the teacher’s assessment to spelling problems. “The teacher commented . . . that when [the Student] listens and reads the teacher notes on the board but doesn’t write them, his comprehension and memory are still excellent.”
  - (2) The Student’s Kildonan Language Training Tutorial Teacher reported the following: The Student is the “top tech kid in the school,” is socially skills, is at the “‘advanced’ end of the dyslexia spectrum, and is reading a lot more, has an excellent memory, is very bright, and that they are working on advanced Latin prefixes and roots.” The tutor was concerned regarding the Student’s ADD and the related effects of impulsivity, distractibility and lack of sustained focus. (B32 at 22)
  - (3) The Language Tutorial took place in a noisy room that was in disrepair and disarray, but that the Student was able to focus and concentrate while shifting back and forth from informal spontaneous conversation to more formal tasks. The Student read aloud fluently from a novel that was estimated to be at an adult level. The Student forget some needed materials. (B32 at 22)

- (4) A review of the Student's records indicates "on-going concerns" about his behavior which center on distractibility and impulsivity which are "annoying" to teachers but not "malicious." The Student is having difficulty in math and needs additional support in math.
- ac. The June 2, 2003 PPT considered the May 27 letter from Dr. Lane and May 28 letter from Ms. Shuptar.
66. The Parents at the PPT June 2, 2003 PPT submitted a list of requests or recommendations, based on the PPS report (B32, at 28) as follows:
- a. The Student be identified as eligible to receive special education and related services on the basis of specific learning disabilities in reading, math, written language and on the basis of OHI-ADHD.
  - b. The Student be provided with an Orton-Gillingham program in all academic areas by associate level or higher teachers.
  - c. The Student be in classes of 5-7 Students.
  - d. The Student be provided with a 1-1 Orton-Gillingham based Language Arts tutorial by an associate level or higher teacher daily.
  - e. Use of a computer or laptop in all classes, the Kurzweil 3000 program, and a digital records with voice recognition.
  - f. A 1-1 math class.
  - g. Board to fund counseling to address ADHD and depression by Trina Shuptar.
  - h. Exemption from foreign language.
  - i. Introduce challenging, honors level materials on an independent basis without placement in an honors class.
  - j. ESY as recommended by Dr. Lane.
  - k. The Parents submitted a list of 26 classroom modifications, discussed more fully below.
67. Classroom modifications requested and proposed for the 2003/2004 school year are listed below.

<b>Classroom of Modifications</b>		
<b>Proposed for 2003/2004 June 2, 2003 IEP (all classes all year) (B32 at 17)<sup>7</sup></b>	<b>Requested by Parents at June 2, 2003 PPT (B32 at 28)</b>	<b>Identified by PPS (B31 at 36-39)</b>
Access to computer		Encourage use of spell checkers and word processing programs.
Calculator		
Books on tape	Books on tape	
Extra time on tests	Extra time on tests/quizzes	
Extra time on projects		
Rephrase text/exam questions	Simplifying test wording	
Extra time –written work		
Modified tests	Modified tests	
Oral testing	Oral testing	Allow for oral reports and exams when necessary
Allow scribe or computer		Allow the Student to dictate writing to a scribe when and if appropriate
Test read		
Option to test in resource room		
Allow extra retakes in math and oral rehearsal		
Modified homework demands		
No spelling penalty	No spelling penalties	
Reduce writing demands to focus on quality of assignments		Decrease the amount of written work and/or simplify the writing assignment
Reduced writing on tests		
No handwriting penalty		
Post assignments		
Preferential seating to		Preferential seating to reduced

<sup>7</sup> These were the modifications specifically identified in the IEP minutes. A number of the modifications requested by the Parents may be subsumed under different headings or descriptors or are likely to be part of the normal classroom routine and would be implemented with the Student regardless of whether doing so was identified in the IEP minutes (e.g., using folders to keep homework organized).

<b>Classroom of Modifications</b>		
<b>Proposed for 2003/2004 June 2, 2003 IEP (all classes all year) (B32 at 17)<sup>7</sup></b>	<b>Requested by Parents at June 2, 2003 PPT (B32 at 28)</b>	<b>Identified by PPS (B31 at 36-39)</b>
minimize distractions		distracting noises
Positive reinforcement as a behavioral management tool		
Cue expected behavior as a behavioral management tool		
Monitor assignments		Assign an aide to check that the Student has recorded his class assignments and understands what is expected of him
Multi-sensory approach	Multi-sensory approach	Multi-sensory approach
Visual reinforcement	Visual reinforcement	Audio-visual reinforcements as "is reasonably possible"
Repeat instructions		
Use mnemonics		
Provide lecture notes/outline	Provide study guidelines	Provide study guides
Para and/or special education teacher support in math and English		
	Modified worksheets and homework	Use graphic organizers and work sheets
	Test study guide	
	Shortened tasks	
	Extra credit options	
	Hands on projects	
	Reduced reading	Reduced reading
	Daily assignment list/pad and homework list	
	Folders to hold work	
	Worksheet formats	
	Break between tasks	Breaks between tasks
	Cuing	
	Review sessions	Pre-teaching
	Picture charts	Use visual aides
	Concrete examples	
	Support auditory presentations with visuals	



68. While at Kildonan, the Student's reading skills were regularly evaluated. Certain of these results are summarized below. These results indicate improvement in some areas and regression in others, suggesting considerable variability in the Student's performance. The Student's WRAT-3 Arithmetic Skills scores on June 2001 was reported 10.8 GE, or two grades above his grade level. His scores on the Stanford Diagnostic Math Test was an 11.5 GE in September 2002 and as 12.5 GE in May 2003. (S6, at 9)

<b>Assessment Device</b>	<b>June 2001 Begin Grade 8 (S6 at 60)</b>	<b>May 2002 End Grade 8 (B32 at 25)</b>	<b>May 2003 End Grade 9 (B32 at 25)</b>
WRAT-3 <sup>8</sup> : Reading	7.2 GE	HS	8.0 GE
WRAT-3: Spelling	6.8 GE	5.0 GE	4.0 GE
GORT-4 <sup>9</sup> -Rate	4.3 GE	6.4 GE	7.7 GE
GORT-4: Accuracy	5.0 GE	4.7 GE	6.0 GE
GORT-4: Fluency	Not Reported	Not Reported	7.0 GE
Gates-MacGinitie Reading Tests – Vocabulary	7.1 GE	PHS	PHS
Gates-MacGinitie Reading Tests – Comprehension	4.2 GE	12.7 GE	PHS

### **WITNESS TESTIMONY**<sup>10</sup>

#### **Trina Shuptar**

69. Shuptar is a Licensed Clinical Social Worker, with 23 years of experience and certifications/specializations in child and family therapy. She has a child who has been identified as learning disabled and her opinions in part reflect that experience as well.
70. Shuptar has been providing services to the family continuously since 1999. She provided services indirectly to the Student starting in 1999 as part of her overall work with the family, but did not begin providing direct services to him until the

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<sup>8</sup> Wide Range Achievement Test-Revision 3

<sup>9</sup> Gray Oral Reading Test-4

<sup>10</sup> Certain witness testimony is summarized in this section. The citation “[Witness] Test.” used in this Final Decision refers to additional witness testimony that may not be set forth in this section.

beginning of 2001 at which point he terminated counseling with Betsy Rodriguez (in part due to Ms. Rodriguez's statements that if the Student continued to be aggressive toward his family she would refer the family to the Department of Children and Families) and began counseling with Ms. Shuptar to continue to address behavioral problems at school and at home. The Student received weekly individual counseling from Shuptar through mid-summer 2001, at which point he enrolled in summer school at Kildonan and all of the problems precipitating the need for counseling disappeared. In late December 2002 the Student's depression and behavioral problems at school and at home became acute again and she resumed counseling him approximately once weekly through May of 2003. During that counseling, Ms. Shuptar tried to give the Student hope that through the efforts of his Parents he would be able to continue to remain at Kildonan. At the end of May 2003, the Student refused to continue in counseling with her. Ms. Shuptar attributes this to his "denial" of the feelings he has about the potential for leaving Kildonan and his recognition that he would have to address those feelings if he were to continue in counseling. She is not currently treating the Student, but considers him to be a patient.

71. The Student has had a positive experience at Kildonan socially, emotionally and academically and feels successful Kildonan for the first time in any of his educational settings. The Student's problems in late 2002 and through the Spring of 2003 reflect his anxiety and unhappiness about the prospect of returning to New Fairfield public schools which he reportedly describes as a terrible educational experience for him. Ms. Shuptar states that the Student believes that New Fairfield personnel consider him a "behavioral monster" and "punished" him in the past by transferring him from school to school. She acknowledges that these events may not correspond to reality, but are real for the Student.
72. The Student's physical aggression toward his Mother reflects his recognition that she is a "safe" person to whom he can direct his most intense emotions. He was physically aggressive toward his Mother prior to enrolling at Kildonan, did not show that behavior when he was at Kildonan and manifested that behavior again when he became aware of the prospect of leaving Kildonan. He is also physically aggressive toward his younger sister.
73. The Student would be at increased risk for drug and alcohol abuse if he were to return to New Fairfield public schools, based on a recent incident in which the Student used marijuana. Other than that incident, he has no history of drug or alcohol use. Although Shuptar described that event as out of character for the Student and of serious concern to her, she also stated that she has not directly discussed or addressed that issue in her counseling with the Student. She also has not referred the Student for any kind of drug or alcohol treatment.
74. The Student would be at increased risk for suicide if he were to return to New Fairfield public schools, and that if the plan were to return him to NFHS she would immediately refer him to a psychiatrist. The Student does not have a history or

suicidal gestures or attempts, and has no “actual suicidal tendencies or plan.”

75. The Student needs to remain at Kildonan for the rest of his high school education to maintain positive self-esteem and a positive self-perception as a capable Student. He perceives Kildonan as a “safe” and “supportive” educational environment.
76. The Student will have difficulty making progress under the proposed IEP and will not be “successful” essentially because it provides for a placement in New Fairfield public schools. The Student will either make himself unavailable or be unavailable for learning due to being too emotionally “charged” because of the negative feelings he associates with the New Fairfield public schools. Shuptar acknowledged that she makes this opinion as a clinical rather than an educational expert, and that it is based on the Student’s “emotional perspective and his already-perceived belief system [that schools other than Kildonan] he will fail.” She cannot offer an opinion as to whether the Student has made educational progress over the years, but assumes that he did because he advanced from grade to grade. She cannot offer an opinion as to whether he can “learn” or make educational progress under the proposed IEP.
77. Shuptar has not made any recommendations to Kildonan regarding the Student and has not had any contact with Kildonan regarding the Student.
78. Shuptar concurs with recommendations that the Student be placed in small classes, because small class size provides him with better opportunities to develop relationships with peers and the teacher. Shuptar concurs with recommendations that the Student’s learning environment be as distraction free as possible.
79. The Student has “serious trust issues” and will work with someone once he trusts them.
80. At least some of the Student’s poor self-esteem and lack of self-confidence in his abilities relates to his experience at New Hope Christian Academy in the 7<sup>th</sup> grade.
81. Shuptar’s working diagnosis of the Student over the years has been dysthymia which is a long term form of depression and which at any moment could become more active and meet the criteria for a major depressive disorder.

### **John Pioli**

82. John Pioli, Ph.D. (“Dr. Pioli”), is a licensed clinical psychologist with approximately 23 years of experience who, together with his wife, Liane Pioli, Ph.D. (“Mrs. Pioli”), operate Pioli Psychological Services (“PPS”). Among other things, Dr. Pioli has served as a school psychologist for the Darien board of education for 16 years and has evaluated between 3 to 5 New Fairfield students in addition to the Student.
83. Dr. Pioli did not meet with the Student or the Parents or administer the

assessments described in the PPS Report. Rather, Mrs. Pioli met with and interviewed the Student and Parent, and administered the assessments. Dr. Pioli wrote portions of the PPS Report based on the results attained by Mrs. Pioli. Mrs. Pioli co-wrote the PPS Report. Mrs. Pioli was unavailable to testify because of the serious illness of a close family member.

84. The Board's psychologist, Mrs. Ferguson, used appropriate judgment in administering the Stanford-Binet to the Student rather than the WISC-III, but that the two assessments are not directly comparable because they reflect differing theories of what constitutes intelligence.
85. The variance over time in the Student's PIQ scores on the various administrations of the WISC-III is likely reflecting the Student's emotional and attentional state at the time of the assessment. The VIQ is less sensitive to interference by emotional and attentional factors than the PIQ. The Student was not being treated medically in 1995 when Dr. Kruger evaluated him, but was medicated when he was administered the subsequent assessments, and that difference could also explain the variability in PIQ. The Student's VIQ scores have remained more stable over time, with variations all within 1 standard deviation and therefore not necessarily of clinical significance.
86. Based on the past assessment data and the 2003 PPS assessment, the Student may have suffered from a major depression in the past, but is dysthymic now rather than depressed. The Student has had some "significant emotional swings" over time and his ability to make academic progress is related to his emotional state, which can interfere with his ability to demonstrate what he knows. Although the Student has made progress in the sense that he has been able to advance from grade to grade, his progress has not always been at the expected rate largely due to emotional factors.
87. The Student is achieving below the level of achievement he is cognitively capable of achieving due to his emotions, and he might never fully function at his greatest potential due to emotional and attentional factors. A child can make educational progress in "any environment" but cannot make "optimal progress unless the environment is optimal."
88. Kildonan is the "optimal" educational environment for the Student at this time because of the small class size and the use of the Orton-Gillingham method across all environments.
89. The Student is "slipping into a depression" based on his "fear" of returning to New Fairfield, where he believes he will not fit in and cannot be successful or function as a student.
90. The June 2, 2003 proposed IEP is an "excellent" IEP for the Student which addresses many of the concerns and problems identified in the PPS Report.

However, the IEP will not be “successful” because since the Student does not believe he can succeed at New Fairfield public schools, he will not succeed.

91. The Board’s counsel voiced no objections to Dr. Pioli’s qualifications to render the opinions he has rendered.
92. The Student’s ability to make academic progress is “very tied” to his emotional state. Although he has progressed from level to level, there were periods when he did not progress at the rate of expectation given his intellectual abilities because of his emotional state. At the current time, he is “far from exhibiting the level of achievement that he is intellectually or cognitively capable to achieve” due to his learning disabilities, attentional problems and the impact of his emotional problems.
93. Dr. Pioli did not state or opine that the Student is not capable of making academic progress in a public school setting.
94. The Student has stated that he will not do well in a setting other than Kildonan and this may become a self-fulfilling prophecy for him. “What I think is missing [from the IEP] is the component of [the Student] feeling that he can succeed [at NFHS] . . . I believe that emotionally . . . if [the Student] believes that he cannot succeed here, the best IEP written would fail, simply for the fact that the youngster would believe it would be inadequate and insufficient . . . [i]f you believe you’re going to fail, why try. If you don’t try, you fulfill the prophecy.”
95. Dr. Pioli has never visited Kildonan or spoken to anyone from Kildonan.
96. Dr. Pioli’s “assumption would be Kildonan or a school like that is the one that will be the least restrictive environment for him to achieve his maximal needs educationally.”

### **Marie Hopkins**

97. Marie Hopkins is the Board’s director of special education services.
98. She met the Student for the first time on December 4, 2002, when she traveled to Kildonan with Susan Wiggins for a meeting with the Student, the Parent and Dr. Lane (Kildonan’s Academic Director). Ms. Hopkins arranged the meeting so that the Student could get to know Ms. Wiggins, who would be doing observations of the Student at Kildonan later than Spring to help develop his IEP for the 2003/2004 school year. Ms. Hopkins thought that the Student would be more comfortable about the observations if he had met Ms. Wiggins before then, and also believed it would be useful for Ms. Wiggins in her work to meet the Student as well.
99. At the December 4, 2002 meeting, Ms. Hopkins took some very cursory notes out of personal habit, which she discarded shortly after the meeting. Ms. Hopkins

made no other notes of any other conversation or meeting that she had with the Parent, Ms. Wiggins or the Student after June 2002. When she wrote the July 11, 2002 letter (S17), Ms. Hopkins indicated that she had not taken any notes. She stated that at the time she did not recall having taken the notes.

100. The Board has no relationship with Ms. Wiggins in a consulting capacity other than with respect to the Student.
101. Ms. Hopkins did not ask Ms. Wiggins to contact the Parent to obtain any information in connection with planning for the 2003/2004 academic year and does not know if Ms. Wiggins ever did so.
102. Ms. Hopkins believes that prior to the May 2003 PPT, Ms. Wiggins reviewed various records regarding the Student in the Board's files, but does not know what Ms. Wiggins reviewed.
103. Ms. Hopkins attended the May 7, 2003 PPT and was present throughout that PPT. She did not attend the June 2, 2003 PPT because she was on medical leave. She had no involvement in drafting the IEP developed at the June 2, 2003 PPT. Upon her return from medical leave just prior to the first day of hearing in this matter, she had an opportunity to discuss the Student's circumstances with Mr. Dickau among others, and reviewed the proposed IEP.
104. With respect to the May 7, 2003 PPT, Ms. Hopkins testified as follows:
  - a. Ms. Wiggins was present at the May 2003 PPT and obtained information presented by the Mother and by Dr. Lane, among others. (Hopkins Test.)
  - b. The Parent provided the Board, through Ms. Hopkins, with a copy of the PPS Report on May 6, 2003. Ms. Hopkins reviewed the PPS Report and came to the conclusion that despite its length it did not really provide any new or different information about the Student than what she understood had been revealed in prior evaluation reports.
  - c. Immediately prior to or at the May 7, 2003 PPT, Ms. Hopkins advised the Parent that the PPS Report contained various inaccurate statements in the introduction about the status of due process proceedings regarding the Student and made determinations regarding the Student's eligibility for special education services that were the province of the PPT. In response to those comments, the Parent asked Ms. Hopkins to have all of the copies of the PPS Report that had been distributed to the PPT members returned. Ms. Hopkins complied, and all copies that had been distributed at the PPT were returned to the Parent. Accordingly, the PPS Report was not discussed at the May 7, 2003 PPT, but rather would be discussed when a corrected copy was presented at a reconvened PPT. Ms. Hopkins did not tell the Parent that she could not discuss the PPS Report at the May 7, 2003 PPT, but rather expressed a

preference that the PPS Report not be discussed until a correct copy was available.

### **The Mother**

105. The Parents advised PPS that the Student was in counseling with Betsy Rodriguez from age 7 until the Fall of 1999, then began counseling with Trina Shuptar “briefly” in the Fall of 1999, and then resumed with Ms. Shuptar in December of 2002. (B-31 at 4)
106. The May 7, 2003 PPT lasted 3 hours, from approximately 8:30 to 11:30 in the morning. A Board staff member responsible for coordinating the Student’s schedule in the 2003/2004 school year, whom the Parent identified as “Mrs. Lawrey” left at one point during that PPT. A regular education teacher member of the PPT (Mr. Kindness) left at some point in the second half of the PPT.
107. Dr. Lane participated in the May 7, 2003 PPT by telephone for approximately 1.25 to 1.5 hours. He explained in detail the Kildonan math program and efforts by Kildonan to respond to concerns raised by Ms. Wiggins regarding the Student’s math program at Kildonan. He responded to Ms. Wiggins’ conclusions regarding the benefits to the Student of taking a foreign language, stating that foreign language is not required at Kildonan because “these kids can hardly learn English let alone a foreign language.” He reported that periodic testing performed by Kildonan with the WRAT, GORT and GM had been done but not yet scored. He discussed the qualifications for teachers at Kildonan with respect to Orton-Gillingham training and experience. He opined that the Student needed to return to Kildonan because he would lose his self-confidence as a Student and become more frustrated if he were to be placed elsewhere. He discussed the Student’s program at Kildonan (including the benefits of the 1:1 daily language tutorial, the unique physical education program at Kildonan, and the Student’s other classes). He discussed the Student’s academic strengths and weaknesses. He discussed what programming the Student would need if he did not return to Kildonan – specifically, the Student would need to continue to work on Latin roots, decoding skills, writing skills, and organizational skills, and would require a more intensive language-based approach to math, continue with technology and multi-media classes, to avoid taking a foreign language, and to continue with the daily 1:1 language tutorial. Dr. Lane participated “to the extent that people had questions” to ask him.
108. After the May 7, 2003 PPT, Ms. Hopkins and Mr. Dickau spoke with the Mother in the hallway and advised her that because of the Settlement Agreement, the Student’s placement would be at New Fairfield High School for the 2003/2004 school year and that if the Parents commenced due process, they would be in breach of the Settlement Agreement and would owe the Board \$19,000. The basis for the Parent’s claim that the Board did not properly plan for the Student’s placement in 2003/2004 in consideration of his needs is that conversation and the

statement at the PPT by Ms. Hopkins that “We have a legal agreement to have him return to New Fairfield that we have to consider.” The Parent also acknowledged, however, that at the June 2, 2003 PPT Mr. Dickau stated that the purpose of the PPT was to determine the Student’s educational programming and that the placement was “not necessarily” limited to NFHS.

109. The Student’s classes at Kildonan had 5-7 students and one teacher, but no other staff or paraprofessionals. The Student had extra tutoring available to him after school which did not appear to be mandatory, which was sometimes recommended and which he apparently was expected to seek out on his own if he believed he needed it. The Student’s use of that opportunity was inconsistent. Sometimes he refused to go. Other times he went when he realized he was several assignments behind and could not catch up without the help.
110. Although Kildonan has a psychologist on staff or available to staff and students, the Student did not receive any psychotherapy or counseling at or through Kildonan.
111. The Student’s daily commute to Kildonan is 1 hour each way (2 hours round trip for the Mother each way). He leaves home at 6:30 a.m. and typically does not return home until 5:30 or 6:00 p.m. The Student’s daily commute to New Fairfield High School would be 5 minutes.
112. Not every document she submitted at the May or June 2003 PPTs are included in the PPT minutes (B32), but she was also not certain as to each document that she handed out. She claims that S9 at 3 was submitted and considered by the PPTs, even though it is not part of the minutes. She is not certain whether S9 at 4 was provided to the May 7, 2003 PPT, but it was provided to the June 2, 2003 PPT.
113. The June 2, 2003 PPT lasted 5 hours, from approximately 10:30 to 3:00. Mrs. Lalley attended a substantial portion of that PPT and participated in the discussion regarding the specifics of programming the Student’s activities in the 2003-2004 school year.
114. At the June 2, 2003 PPT, the Parent provided the Board with a “corrected” copy of the PPS Report (B32) and the school psychologist (Mr. Cooney) and the Parent, among others, discussed the PPS Report in some detail.
115. At the June 2, 2003 PPT, the Parent requested that the Student’s classes be limited to 5-7 students. The Parent gave the PPT on June 2, 2003 her list of requests/recommendations for programming (B32, at 28). She did not provide that list prior to the PPT. The PPT eventually addressed “every single” one of those requests/recommendations.
116. At the June 2, 2003 PPT, the Parent distributed to each PPT member a copy of the document she had prepared entitled “A Portrait of [the Student]” and asked to be



able to read it to the PPT members. She was told by Mr. Dickau that it was not necessary to read it because she had given out a written copy so that reading it would be duplicative for that reason and also because the Portrait mirrored information or was based on the PPS Report, which also had been provided to the June 2, 2003 PPT. Mr. Dickau never told her that she could not discuss the information in the Portrait. She was ultimately offered the chance to read the "Portrait" but chose not to do so. B32 at 28 is part of the "Portrait" but was not distributed at the same time as the remaining pages of the "Portrait."

117. Dr. Lane did not talk about ESY at the May 7, 2003 and the Parent did not request any such services or raise the issue at the May 2003 PPT. The first time ESY was raised was in the June 2, 2003 PPT, at the end of the PPT. Mr. Dickau told the Mother that the PPT could not address the issue at the time because he did not have the correct personnel available to do so. The Board's counsel advised that the PPT needed to make the decision, but Mr. Dickau said it could not. After the PPT was over, Mr. Dickau approached the Parent and asked her if it would be acceptable if he contact the appropriate personnel and obtain the necessary information about summer programming from them. In the alternative, he offered to reconvene the PPT to address the summer programming issues. The Parent refused to agree to either option because she believed the PPT had all of the information it needed and that this was a "stall" tactic by the Board. The Parent stated that she advised Mr. Dickau to "do what he needed to do" but that she would not reconvene the PPT.
118. The first time the issue of a 1:1 math placement was raised was at the June 2, 2003 PPT. No professional has ever made such a recommendation with respect to the 2003/2004 school year.
119. When asked to summarize what she wanted in a placement for the Student for 2003/2004, the Parent testified that she was open to a placement at NFHS when she approached the May and June 2003 PPTs, then testified that she wanted the Kildonan program replicated at NFHS, and then testified that even if the Kildonan program were replicated at NFHS the program would not work for the Student.
120. When asked to more specifically state her primary concerns with the proposed 2003/2004 IEP, the Mother identified the lack of an Orton-Gillingham approach in all courses, the refusal of the Board to pay for counseling with Shuptar, the proposed class size, and lack of structure regarding the counseling service to be provided under the proposed IEP.
121. The Student's first grade teacher told her he was a "behavioral monster" and the Mother believes that the Student first understood that the Board considered him a "behavioral monster" when he was in the 4<sup>th</sup> grade after the Parents had returned him to public school from his placement at St. Gregory's when the class size at St. Gregory's increased to 32 students. The basis for the Mother's statements are unclear, as she also testified that she believed that the Student understood that he

was considered a “behavioral monster” by the Board since the 1<sup>st</sup> grade. In any event, the Parents unilaterally placed the Student at New Hope Christian Academy for the 6<sup>th</sup> grade because the Student’s IEP was not being implemented in the 5<sup>th</sup> grade. However, the Parent testified that she did not ask the Board to provide special education services to the Student for the 6<sup>th</sup> or 7<sup>th</sup> grades because the Student was “too frustrated” and the Parents wanted to “give him a break.” The Parent appeared to acknowledge that the transfer from New Hope to Kildonan for the 8<sup>th</sup> grade had nothing to do with dissatisfaction with services being provided by the Board or with concerns regarding a placement at NFHS – rather, the placement was based on problems the Student was experiencing at New Hope.

122. The Student’s depression has been treated medically for depression since 8<sup>th</sup> grade with Celexa. He briefly tried another medication for depression in March 2003, but that has been discontinued. He has not been treated medically for ADHD while at Kildonan and is not currently being treated medically for ADHD.
123. The Student was first told about the plan to return him to NFHS in June 2002, after the Settlement Agreement was executed. His reaction at the time was positive. At the December 4, 2002 visit with Ms. Hopkins and Ms. Wiggins he realized that he would in fact be leaving Kildonan. At the time, the Parents were also engaged in due process with New Fairfield concerning the Student’s sister’s programming. Shortly after the December 4, 2002 meeting, the Student began hitting the Mother and manifesting other behaviors, including a slide or decline in his performance at Kildonan. He resumed seeing Ms. Shuptar for the first time since the summer of 2001 and the Parents obtained the PPS evaluation to determine the Student’s current functioning in light of these events.
124. The Parents are not claiming that the Board violated their due process procedural rights by refusing to consider Parental strengths and weaknesses, but rather failing to consider certain of the Student’s strengths and weaknesses.
125. Kildonan is a therapeutic milieu because the teachers are all trained to recognize the connection between their student’s emotional/behavioral problems and learning disabilities, and thus provide an appropriately supportive environment unlike in the NF public schools. This training is part of the Orton-Gillingham method. The Kildonan teachers are not, however, trained counselors, therapist, social workers or psychologists, and the Student received no individual or group psychotherapy or counseling at Kildonan.
126. The Parent is not specifically requesting a 1:1 math class, but rather believes the math objective is deficient because of the large class size and lack of direct educational and emotional support for the Student in connection with math.
127. The mentoring objective in the IEP is deficient because it requires the Student to seek the mentor out on his own and provides only for counseling regarding academic issues.

128. As to the Parents' claim that staff met improperly outside of the May and June 2003 PPTs regarding the Student: After the May 7, 2003 PPT, Ms. Hopkins and Mr. Dickau spoke to the Parent regarding the Settlement Agreement and stated that should the Parent commence due process the Parents might owe the Board \$19,000. Mr. Dickau and Ms. Hopkins also advised the Parent that the Board's attorney would attend the next PPT. After the June 2, 2003 PPT, Mr. Dickau approached the Parent to discuss the ESY issue. According to the Mother, he also asked if the Parent would find the IEP more acceptable if the Board agreed to pay for counseling with Ms. Shuptar.<sup>11</sup>
129. The IEP was not reduced to final written form as of the end of the June 2, 2003 PPT. It was reduced to final written form after the PPT was over and mailed to the Parent. The Parent received it six days after the PPT was over. When asked by the Hearing Officer whether the IEP was inaccurate or inaccurately recorded the proposals that had been made at the PPT, the Parent could not identify any such inaccuracies. The Parent instead offered testimony that reflected her disagreements with the proposed IEP on the merits or questions that she had.
130. As to the claim that the Board refused to reconvene the June 2, 2003 PPT, the Parent testified that she did not want the Board to reconvene the June 2, 2003 PPT.
131. The Student was "very" suicidal at the end of the 7<sup>th</sup> grade to the extent that the Parents considered hospitalizing him. The Parent believes the Board was informed or aware of this at the time, and should have considered it in connection with the 2003/2004 school year. Neither Ms. Shuptar's May 28, 2003 letter (which was delivered to the Board on June 2, 2003) or the PPS Report say anything about the Student being a suicide risk. The Student's history with suicide issues was not mentioned in S5, which is an academic history prepared by the Mother for this hearing.
132. The PPS Report demonstrates additional disabilities and wider discrepancies between potential and performance than prior testing.

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<sup>11</sup> The Board, through cross-examination of the Mother by counsel and through Mr. Dickau, suggests that this discussion was in the nature of a good faith settlement offer. Making such an offer is not in and of itself improper but would be improper if the Board had deliberately withheld including counseling with Ms. Shuptar in the IEP where it was clearly needed, and then offered that counseling to settle the resulting dispute regarding the IEP. Based on what the Board understood about the Student's mental state at the May and June 2003 IEPs and given the inclusion of the mentoring/counseling component and Mr. Dickau's testimony thereto, the latter does not appear to have been the case.

133. The only time that the Student had behavioral issues was in the Board's schools.
134. The Parent obtained the PPS Report for the Student because PPS had recently completed an evaluation of the Student's sister and the Parents desired to have as comprehensive and thorough an evaluation performed regarding the Student in light of his deteriorating condition and in anticipation of planning for the 2003/2004 school year. The Parents did not obtain the PPS Report because they disagreed with an evaluation of the Board.

### **Susan Wiggins**

135. Ms. Wiggins was retained as an independent consultant pursuant to the terms of the Settlement Agreement to assist in developing the Student's programming for the 2003/2004 school year.<sup>12</sup> In that capacity, she interviewed the Student and observed him while he was at Kildonan on December 4, 2002, reviewed various of the Student's educational records including records from Kildonan, observed the Student at Kildonan on May 2, 2003, spoke with various of his Kildonan teachers at that time, and participated in the entire PPT on May 7, 2003 and all but approximately the last hour of the June 2, 2003 PPT.
136. Ms. Wiggins has attained the status of "fellow" within the accreditation ranking system for providers who utilize the Orton-Gillingham method.
137. In the Orton-Gillingham accreditation ranking system, the lowest level of accreditation is the "subscriber," which is usually for parents or regulation education teachers. Subscribers have completed a 10 hour overview the Orton-Gillingham method. A subscriber has not been trained to use the Orton-Gillingham method. The next level is "associate." An associate has completed the subscriber level as well as an additional 45 hours of course work and 100 hours of a practicum of which 10 hours are supervised. The next level is "certified." A "certified" person has completed the associate level as well as an additional 100 hours of course work and 200 hours of a practicum. The highest level of accreditation is "fellow." A fellow has the expertise, experience and training to teach the method to others.
138. Karen Sulzmann is a speech and language pathologist employed by the Board. She is an "associate applicant" with respect to Orton-Gillingham at this time. Wiggins trained Sulzmann. She has had 45 hours of course work and close to 200 hours of practicum. Under the proposed IEP, Ms. Sulzmann will provide consultation to staff working with the Student. Ms. Wiggins opinion as an accredited fellow is that Ms. Sulzmann is competent to provide services to the

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<sup>12</sup> Ms. Wiggins' curriculum vitae was marked as exhibit HO4 and contains information demonstrating that she has the expertise and qualifications to render the opinions that she did. The Parent did not challenge Ms. Wiggins' qualifications and expertise to render those opinions.

Student.

139. Jennie Gawlik is a special education teacher employed by the Board who will be providing direct Orton-Gillingham instruction to the Student under the proposed IEP. She has not yet applied for accreditation in the Orton-Gillingham method. Ms. Wiggins has also trained Ms. Gawlik. Ms. Gawlik has had 45 hours of course work to date. The Student is functioning at a very high level under the Orton-Gillingham methodology. Ms. Gawlik does not yet have experience working with someone at the Student's level. Although she has not had a student at this level before, Ms. Wiggins opinion as an accredited fellow is that Ms. Gawlik is competent to provide instruction to the student.
140. The Orton-Gillingham method is a multi-sensory approach to teaching language in all of its forms specifically to students with language learning disabilities. An organization called the "academy" has developed the accreditation standards for practitioners.
141. The Student's 1:1 language tutor at Kildonan is not a member of the academy.
142. At the June PPT more time was spent reviewing and discussing the evaluation reports, particularly the PPS Report, than was spent discussing the specific components of the IEP. The discussion of the PPS Report was extensive and included a discussion of specific scores and their implications, and thoroughness and complexity of the PPS Report. Ms. Gawlik and Ms. Sulzmann reviewed their draft IEP with the PPT members.
143. Ms. Wiggins is familiar with the Kildonan School and its founder, who is a colleague of hers. Not all of the teachers at Kildonan are accredited by the academy. Some of them are not certified but have the experience comparable to be certified and not all of them are members of the Academy.
144. Ms. Wiggins did not believe that Kildonan was an appropriate placement for the 2003/2004 school year because the Student has "got so much ability" that Kildonan would not be a sufficient challenging environment for him and would not provide the Student as "much enrichment as I think from my point of view that he's capable of." A placement at NFHS would provide those challenges and enrichment opportunities including the opportunity "to try to take a foreign language" which Ms. Wiggins concludes would be "appropriate with someone with his profile," would provide more opportunities for him to develop his technology skills and talents (which the Parent testified was important to him), and would expose him to a wider and more varied peer group in which he could continue to develop his social skills.
145. Ms. Wiggins was particularly concerned about the Student's difficulties with math this year and Kildonan's inability to address those concerns other than providing a small class size for him in which at one point in the 2002/2003 school year he was

failing. The Student's math issues can be addressed at NFHS.

146. Ms. Wiggins was aware that the Settlement Agreement provides for a placement in the New Fairfield school district for the 2003/2004 school year. It was her understanding that she was supposed to have an opinion regarding an IEP for the Student "wherever he went to school" and that she was to take a close look at his needs with her Orton-Gillingham background. Based on the information she gathered regarding the Student, she was able to reach an opinion that for the 2003/2004 school year the Student should be placed "in a mainstream environment with supports in language arts, mathematics and study skills and strategies" along with a counseling component. She did not recommend the counseling component, but does not disagree that it is appropriate. Her conclusions were not influenced by knowledge of the provisions of the Settlement Agreement and absent the Settlement Agreement she would have made the same recommendations. The program reflected in the June 2, 2003 IEP will, in her opinion, meet the Student's educational needs.
147. Ms. Hopkins asked Ms. Wiggins to participate in the December 4, 2002 meeting to introduce Ms. Wiggins to both the Parent and the Student. Ms. Wiggins was asked to observe the Student in his placement at Kildonan, review his records and attend the PPTs. Ms. Wiggins was not asked to contact the Parent by Ms. Hopkins and did not consider it part of her role as her role was explained to her.
148. Ms. Wiggins recalls that at the May 7, 2003 PPT, the Parent had copies of the PPS Report but decided not to pass them out because she wanted to take some things out of the reports and Ms. Hopkins suggested that it was not appropriate for the team to see the report until it had been corrected.
149. Although Ms. Wiggins was not present at that portion of the June 2, 2003 PPT in which ESY programming was discussed, she recalled a discussion among the team members that she Student would not qualify for ESY services. In her professional opinion, the Student would not need ESY services because "his skill levels were high enough."
150. Ms. Wiggins had no further input into the Student's programming for the 2003/2004 school year after the June 2, 2003 PPT.
151. The PPS Report "paints a picture of [the Student] as more impaired" and in need of remediation than she had concluded based on her observations of him. Ms. Wiggins was "surprised by some of the [PPS R]eport" but it did not change her opinion about his educational needs.
152. The May 8, 2002 PPT was used as a working draft and a "springboard" for the June 2, 2003 IEP.

**Mr. Dickau**

153. Mr. Dickau has been employed by the Board for 6 years and currently is coordinator of services for secondary school students, which includes responsibilities for special education and guidance counseling services to students in the 6<sup>th</sup>-12<sup>th</sup> grade. Prior to working for the Board he worked for 14 years in the Terryville public schools serving as director of guidance and an assistant principal. He has attended “thousands” of PPTs over the course of his career.
154. Mr. Dickau has never met the Student. He attended the May 7, 2003 PPT and chaired the June 2, 2003 PPT. In connection with this hearing and his testimony he has listened several times to tapes of the two PPTs provided by the Parent and determined that the May 7, 2003 PPT lasted 1.5 hours and the June 2, 2003 PPT lasted 3 hours and 18 minutes (by the tape). He estimates that the Parent presented information and other discussed issues for approximately 50% of the discussion at the June 2, 2003 PPT. Although the Board’s counsel indicated that the Board believed that the transcripts (S11 and S12) prepared by the Parent were essentially accurate, they did have omissions (marked by the designation “inaudible”). Mr. Dickau believed that several specific aspects of the transcripts were inaccurate.
155. Dr. Lane was invited to attend the June 2, 2003 PPT. He was identified on the list of invitees, and under the procedures in place he would have received the invitation as an identified invitee. Three notices regarding the June 2, 2003 PPT were sent out and the Board did not receive any indication that they were not received by Dr. Lane.
156. When Dr. Lane did not appear at the June 2, 2003 PPT, Mr. Cooney (a school psychologist employed by the Board) attempted to contact him to conference him into the PPT, but he was unavailable and efforts to include Dr. Lane were not successful. The Parent agreed to proceed in Dr. Lane’s absence.
157. Ms. Gawlik had prepared a working copy of a classroom modifications list for the Student prior to the June 2, 2003 PPT, brought it with her to the PPT and distributed it to the members. The working copy reflected information from the PPS Report and was modified through the discussion at the PPT, reflecting in part input from Ms. Wiggins regarding the Student’s math issues and from the Parent reflecting her concerns regarding spelling.
158. The Board staff used the May 8, 2002 IEP as the basis for developing the 2003/2004 IEP because it was the most recent IEP the Board had prepared for the Student. Typically, a PPT starts with the most recent IEP and then determines what changes need to be made to reflect the student’s current situation. Kildonan had no IEP for the Student, so the Board staff used the May 8, 2002 IEP as the starting point for developing the 2003/2004 IEP.

159. The 2003/2004 IEP proposal included a multifaceted counseling component. In Mr. Dickau's view, Ms. Gawlick would act as the Student's mentor/case coordinator, would meet with the Student daily to discuss any issue of concern, whether academic or nonacademic, would facilitate connecting the Student with other counseling services within NFHS such as the school psychologist, guidance counselor and/or social worker as needed or indicated, and facilitate communication and coordination with his teachers. The 1:1 meeting time with the Student and his mentor/case coordinator was built into his schedule but the specific daily times were not established at the June 2, 2003 PPT. Although Mr. Dickau had intended that Ms. Gawlick would serve this function, she was not specifically identified as the mentor/coordinator at the June 2, 2003 PPT. The Student's access to psychological/guidance/social work services would be as needed. As part of Goal # 4 in the IEP the Student was expected to learn to identify when he needed such services, but Ms. Gawlick was available to assist him and direct him to those services as appropriate.
160. The IEP contemplated quarterly meetings to review the Student's progress and modify the IEP. The Parents were to be part of those meetings.
161. The Student needed support in math and the IEP provides for the Student to have access to a special education teacher or paraprofessional in his math classroom for support, along with other eligible students who need that assistance. Accordingly, the Student would receive small group support and possibly 1:1 services in math in the mainstream setting.
162. At the June 2, 2003 PPT the parties discussed, among other things, electives available to the Student but no specific elective choices were made. Rather the decision was deferred to the beginning of the year to allow the Student to select electives of interest to him. The PPT also discussed whether the Student should initially have a structured study hall rather than electives upon his arrival to NFHS.
163. The issue of class size was discussed at the PPT, with the Board's staff concluding that the Student could be successful in mainstream classes with the supports and classroom modifications being proposed. That determination was made in part based on the Student's past performance in mainstream settings.
164. As to Goal # 1, the Student will be evaluated based on work product he produces and improvement as shown by pre- and post-testing. There is no way to determine from the IEP as it presently stands whether the Student actually reached these goals and objectives. Mr. Dickau suggested that an 80% success rate would be appropriate.
165. As to Goal # 2 (performance in all academic classes), the IEP provided for an overall target of C level grade work, or approximately a 75% success rate.
166. As to Goal # 3 (vocational/career), the criteria for completing the objective are



- defined in the objectives themselves. In other words, one objective is for the Student to take the PSAT and another to complete a career interest inventory. As those tasks are completed, the Student's attainment of that objective is self-evident.
167. Mr. Dickau was unable to articulate the PPT's rationale for not quantifying the success criteria for Goal # 4 (social/emotional issues). He agreed with the Hearing Officer that this Goal presents particular problems with quantification; that the Student was deemed not to have these skills such that the initial success criteria was prompting the Student to do them; that subsequent fine tuning of the objectives would establish increasingly more rigorous success criteria (e.g., 25%, 50%, etc.); and that it was contemplated that the issue of his success on this Goal would be reviewed in the quarterly meeting. This was not clearly stated, however, in the IEP. Mr. Dickau estimates that a sufficient baseline data would be obtained by no later than January 2004 and possibly by November 2003 and concurs that an order that the Student's performance on this goal be reviewed in a PPT by no later than early 2004 would be appropriate.
  168. At the June 2, 2003 PPT, the Parent requested ESY services for reading only. No consensus was reached as to ESY as of the end of the June 2, 2003 PPT and the had not recommended ESY. Accordingly, by "default" no ESY services were implemented. Ms. Lalley, a regular education teacher who was also part of NFHS's guidance staff, was present at both the May and June 2003 PPTs.
  169. The Student's learning and emotional problems are intertwined. The PPT refused to fund counseling with Ms. Shuptar because the IEP provided for counseling by the Board's staff as needed or required with respect to the Student's transition to NFHS, including both the academic and non-academic aspects of the transition. The Board did not necessarily oppose funding counseling with Ms. Shuptar if needed to support the Student's academic functioning, but it was unclear whether the focus of Ms. Shuptar's counseling was on supporting the Student's academic functioning.
  170. At the June 2, 2003 PPT, Mr. Cooney, summarized the PPS Report results and focused on the recommendations. He did not spend much time discussing specific subtest scores or discrepancies between scores or across testing, because the more important data for purposes of educational planning was the recommendations, which were reviewed and reflected in the IEP.
  171. Exhibit B34 are the Notices of the June 2, 2003 PPT dated May 7, May 27 and May 30, 2003. Dr. Lane is identified as an invitee, and therefore would have been a recipient of the Notice.
  172. The PPS Report was received by the Board shortly after the May 7, 2003 IEP.
  173. Mr. Dickau was aware of the terms of the Settlement Agreement in connection

with the May and June 2003 PPTs, but did not consider the PPT bound in formulating the 2003/2004 IEP for the Student by clauses providing for a placement of the Student at NFHS. The 2003/2004 IEP reflects a program appropriate to the Student's needs.

174. The Student is eligible to receive special education and related services on the basis of specific learning disabilities in reading, language arts, math and writing. The Student was not identified as eligible on the basis of ADHD or depression, but the IEP was designed to address those concerns. The Board agrees that the Student has ADHD and depression.
175. In the period after June 2, 2003, the Board's staff reduced the discussion from the May and June 2003 PPTs to a final IEP.
176. Although the Student's regular education teachers are not trained in the Orton-Gillingham method, Ms. Gawlick and Ms. Schulzmann will work with them to implement Orton-Gillingham techniques with the Student.

### **CONCLUSIONS OF LAW**

Specific Findings of Fact ("F#") drawn from the Factual Background and Testimony sections of this Final Decision supporting each of the following Conclusions of Law are identified below. Findings of Fact are based in part on the Hearing Officer's assessment of the credibility of the witnesses, including the expert witnesses. A citation to certain witness testimony and/or a certain exhibit in the record as a Finding of Fact to support a particular Conclusion of Law is not meant to suggest that that testimony or document is the only evidence that supports that Conclusion.<sup>13</sup> Citations to specific evidence are for illustrative purposes and not meant to exclude other admissible evidence in the record which supports that Conclusion of Law. For this reason, to the extent that any portion of this Final Decision states a Finding of Fact or a Conclusion of Law, the statement should be so considered without regard to the given label of the section of this Final Decision in which that statement is found. *See, e.g., Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

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<sup>13</sup> *Some but not all* of the testimony offered by the Parent (much of which came in the form of lengthy assertions of fact embedded in her questions directed to witnesses), Mr. Dickau and Ms. Shuptar reflects interpretation of facts or argument. Where a Conclusion of Law or Finding of Fact expressly or implicitly credits a version of events offered by one witness as opposed to the version offered by another witness, the citation reflects a conclusion as to credibility on that point.

## General

1. There is no dispute that the Student is eligible to receive “special education”<sup>14</sup> and “related services”<sup>15</sup> on the basis of specific learning disabilities in reading, language arts, math and writing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (the “IDEA”) and its implementing regulations, 34 C.F.R. §§ 300.1 – 300.754 (the “IDEA Regulations”), and to Connecticut’s special education laws, Conn. Gen. Stat. §§ 10-76, *et seq.* and their related regulations, Reg. Conn. State Agencies §§ 10-76-1 *et seq.* The Board does not dispute that the Student has ADHD and suffers from a depressive condition, at this time dysthymia. (*See* F174)
2. The Board is required by the IDEA to provide the Student with a “free appropriate public education” (“FAPE”) in the least restrictive environment (“LRE”) if the Student is a “child with a disability” because he has a physical impairment, serious emotional disturbance, a specific learning disability or an “other health impairment” and by reason thereof needs special education and related services. IDEA, 20 U.S.C. § 1401(3); IDEA Regulations § 300.7(a)(1)-(2).
3. FAPE is “special education” and “related services” provided at public expense, under public supervision and direction, and without charge to the parents of an eligible child which meet the standards of the State educational agency and are provided in conformity with the student’s individual education plan or “IEP.” *See, e.g.*, IDEA, 20 U.S.C. § 1401(8).
4. As to LRE, the IDEA, 20 U.S.C. § 1412(a)(5)(A), requires that LEAs:

assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .

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<sup>14</sup> “Special education” is defined in pertinent part at 20 U.S.C. § 1401(25) to mean: “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”

<sup>15</sup> “Related services” are defined in 20 U.S.C. § 1401(22) to include, among other things, transportation and psychological, social work or counseling services “as may be required to assist a child with a disability to benefit from special education.”

This provision reflects a rebuttable presumption that the appropriate setting for an eligible child is the mainstream or regular education environment.<sup>16</sup> The IDEA requires LEAs, in determining an eligible child's placement and program, to consider the educational benefits, both academic and nonacademic, available to the child in a mainstream placement since a child's academic performance may be positively affected by beneficial nonacademic aspects of the mainstream environment. LRE requires that even if it is determined that a child with disabilities cannot be satisfactorily educated in a mainstream classroom, that child must still be included in the mainstream environment to the maximum extent appropriate. For this reason, LEAs must evaluate whether an eligible child can be educated in a mainstream classroom if provided with supplementary aids and services, and consider a full range of such services before exploring placement in a segregated or non-mainstream environment.

5. Notwithstanding the IDEA's mainstreaming mandate, the child's placement must still be determined on the basis of his/her individualized needs. Accordingly, for some children, FAPE in the LRE may be a segregated setting which does not include any mainstream components or interaction with non-disabled children. The need for placement in a segregated setting may be due purely to educational factors, purely to non-educational factors (such as physical, social, emotional or behavioral problems) or to some combination of the two.<sup>17</sup>
6. The Board satisfies its obligations under the IDEA if: (1) the Student's educational program at issue, as reflected in the proposed IEP, was developed in compliance with the IDEA's procedural requirements; and (2) the program, as reflected in the IEP, is "reasonably calculated to enable the child to receive educational benefits." See, e.g., *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 206-207 (1982); *Walczak v. Florida Union Free Sch. Dis.*, 142 F.3d 119, 122 (2d Cir. 1998).
7. The purpose of the IDEA is to "open the door of public education to [disabled] children on

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<sup>16</sup> See, e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (2<sup>nd</sup> Cir. 1993) (IDEA's preference for mainstreaming rises to level of rebuttable presumption); *Mavis v. Sobol*, 839 F.Supp. 968 (N.D.N.Y. 1993) (IDEA favors mainstream placement unless the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be "satisfactorily achieved").

<sup>17</sup> Courts have fashioned several similar but not identical tests for balancing educational benefits with mainstreaming. See generally *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044-45 (5<sup>th</sup> Cir. 1989) (because an individualized, fact-specific inquiry is required, a variety of factors are relevant to the determination with no specific factor dispositive in all cases); *Roncker v. Walter*, 700 F.2d 1058 (6<sup>th</sup> Cir. 1983) (determine first what makes the segregated placement superior and then whether those services can "feasibly" be provided in a non-segregated setting); and *Sacramento City Sch. Unified Sch. Dist. V. Holland*, 20 IDELR 812 (9<sup>th</sup> Cir. 1994) (balance the educational and non-academic benefits of full-time placement in mainstream setting, the "effect" the student has on the teacher and the class, and the cost of mainstreaming).

appropriate terms [rather than] guarantee any particular level of the education once inside.” *Rowley*, 458 U.S. at 192. Neither the IDEA, nor Connecticut law, require that the LEA provide an educational program which maximizes a child’s educational potential.<sup>18</sup> Instead, the IDEA requires an LEA to provide an IEP that is “reasonably calculated to enable the child to receive educational benefits[.]” *Rowley*, 458 U.S. at 206-07; *K.P. v. Juzwic*, 891 F. Supp 703, 718 (D. Conn. 1995) (applying *Rowley* standard). An IEP is reasonably calculated to enable the child to receive educational benefits if it is “likely” to produce progress rather than regression. *See, e.g., M.S. v. Bd. of Educ. of the City School Dist. of the City of Yonkers*, 231 F.3d 96, 103 (2<sup>nd</sup> Cir. 2000). There is no one standard for determining what constitutes a “meaningful educational benefit.” Objective factors such as the achievement of passing marks and advancement from grade to grade can be indicators of meaningful educational benefits. *See, e.g., Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2<sup>nd</sup> Cir. 1997).

8. Although the IDEA does not require that the LEA provide the best education that money can buy, any program that is provided must be reasonably calculated to produce more than trivial educational benefits.<sup>19</sup> The child’s capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit on the child. *See, e.g. Hall*, 774 F.2d at 635.
9. Since the LEA is not required to fund a parent-initiated placement, parents who unilaterally place their child in a private program without the consent of or referral by the LEA do so at their peril. A hearing officer may require the LEA to reimburse the parents for the cost of that placement if the hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to the unilateral placement and that the private placement provides the child with the required special education and related services, regardless of

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<sup>18</sup> *See, e.g., Lunceford v. District of Columbia Board of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984) (IDEA “does not [require the LEA to provide] the best education money can buy”); *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989) (IDEA does not require the LEA to provide an education “that might be thought desirable by ‘loving parents’”); *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988) (“proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the [IDEA].”)

<sup>19</sup> *See, e.g., Walczak*, 142 F.3d at 130 (the “door of public education” must be opened for child with a disability in a “meaningful way”); *Mrs. B.*, 103 F.3d at 1121 (requirements of FAPE under the IDEA are not satisfied if an IEP affords the opportunity for only “trivial advancement”); *Hall v. Vance County Board of Education*, 774 F.2d 629, 630 (4th Cir. 1985) (same); *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988) (Congress “envisioned that significant learning would transpire in the special education classroom—enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society”).

whether it is a state approved facility.<sup>20</sup>

10. Placement in a segregated environment is FAPE in the LRE when the Student's educational disabilities are such that the Student cannot progress in or receive a meaningful educational benefit in the mainstream environment. Where a segregated placement is required for medical, social or emotional (i.e., non educational) problems, that placement is FAPE in the LRE without regard to the seriousness of the educational problems if "the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem," cannot "effectively" be treated outside of the segregated setting and "prevent the child from making meaningful educational progress" outside of the segregated setting. *Mrs. B.*, 103 F.3d at 1122 (emphasis added).<sup>21</sup>
11. The essence of the Parents' claim is that the Student needs to remain at Kildonan because: (1) Kildonan is an optimal learning environment for the Student and one in which he has made academic progress and has improved his self-esteem and self-confidence with respect to his identity as a student; and (2) if the Student is placed at NFHS he will "shut down" or otherwise not be successful as a student because he has had such a bad educational experience in the Board's schools and because the learning environment at NFHS will not be the same as Kildonan. They claim that the Board has denied the Student FAPE in the LRE by refusing to place him at Kildonan given the information considered and data provided at the June 2, 2003 PPT. (S2 at 3) They seek "a three year placement for [the Student at Kildonan] so that he will not experience the emotional trauma of each year not knowing where he will be for the next school year [since] this does not give him a sense of security or willingness to want to do well if he is going to be bounced back and forth. He needs consistency at this point of his life."

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<sup>20</sup> See, e.g., *Florence County School District v. Shannon Carter*, 114 S.Ct. 361 (1993); 34 C.F.R. § 300.403(c); *Board of Education of Somers Cent. Sch. Dist.*, 31 IDELR 253 (NY 1999) (parents were not entitled to reimbursement for a unilateral placement where placement could not provide the related services identified in the IEP).

<sup>21</sup> The Second Circuit rejected the DOE hearing officer's finding in *Mrs. B.* that the LEA was not obligated to fund the full cost of residential placement because "predominantly and significantly the [student's] problems gr[e]w out of the home situation rather than the school environment." See also *Naugatuck Bd. of Educ. v. Mrs. D.*, 10 F.Supp.2d 170, 181 (D. Conn. 1998) (even though the student's "academic problems were not serious, his social and emotional needs were severe and qualified as educational needs which warranted residential placement"); *McKenzie v. Smith*, 771 F.2d 1527 (D.C.Cir. 1985) (LEA was responsible for funding the residential treatment of a child with severe emotional disabilities because the child required a highly structured environment in order to learn); *King v. Pine Plains Central School Dist.*, 918 F. Supp. 772 (S.D.N.Y. 1996) (when the residential placement is a response to medical, social or emotional problems that are segregable from the learning process, the LEA must cover the cost of special education and related services but need not fund medical treatment or other non-educational expenses).

(S4, at 1) (*See also* F119)

12. The evidence supports a finding that Kildonan *may* be an optimal learning environment for the Student.<sup>22</sup> However, even assuming Kildonan is an optimal learning environment for him, that fact says nothing about whether the placement proposed in the June 2003 IEP is not reasonably calculated to provide the student with nontrivial educational benefits.
13. The Parent has identified no placement other than Kildonan for consideration by the Board. The evidence does not support a finding that Kildonan is the LRE for the Student.
14. The Student is presently identified as eligible based on specific learning disabilities in reading, writing, and math, which largely appear to be interrelated manifestations of an immature auditory processing system. (F10, F43)
  - a. There is nothing inherent about the Student's specific learning disabilities or combination of learning disabilities which would warrant a finding that the Student cannot make meaningful educational progress in a mainstream environment with special education support, cannot benefit from the nonacademic aspects of such a placement or that an IEP proposing such a placement is not reasonably calculated to provide him with such educational benefits. *See, e.g.*, HO2, at 49-56;<sup>23</sup> F144, F146.

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<sup>22</sup> No witness from Kildonan was available to testify about the information in the Kildonan documents that were submitted at hearing. According to the Mother, Ms. Shuptar and Dr. Pioli, the Student's emotional state greatly influences his availability for learning, and Kildonan is an optimal learning environment for the Student primarily because he feels "safe" and successful there. (F71, F88, F92 Mother Test.) From a purely educational perspective, PPS opines that Kildonan is an optimal environment because of the small class size and use of the Orton-Gillingham method across classes. Objective test data from Kildonan does not paint as positive a picture, however. For example, the Student's performance on measures of academic achievement over the course of his placement at Kildonan has been variable, showing good progress in some areas and regression in others. (F68) A comparison of his performance on the WIAT from Dr. Kruger's 2000 testing and from the PPS 2003 testing shows similar results – progress in some areas, regression in others. (S7, at 1) A comparison of his performance on the Woodcock Achievement Tests as of April 2001 (the end of his last year at New Hope Christian Academy) and as of May 2002 (the end of his first year at Kildonan) show a similar unevenness in progress at Kildonan. In contrast, Ms. Wiggins, focusing on his educational performance, opines that he is functioning at a very high level at Kildonan, that Kildonan may no longer be a sufficiently challenging academic environment for him and that Kildonan may in fact be too limiting an environment for him. (F139, F144, F145, F149, F151)

<sup>23</sup> The defining characteristic of a learning disorder, according to the DSM-IV-TR, is performance on standardized achievement tests that is substantially below that expected for age,

- b. No expert has recommended that the Student requires a placement at Kildonan because his specific learning disabilities will prevent him from receiving any meaningful educational benefits in a mainstream setting. Rather, the testimony has been that Kildonan (because it provides an Orton-Gillingham based approach in a small class size setting) is an optimal learning environment for the Student. (*See, e.g.*, F88, F90, F93, F94)
  - c. Even assuming Kildonan is an optimal learning environment for the Student, however, that fact has no bearing on the substantive standard against which the proposed IEP must be measured, which is whether the IEP is reasonably calculated to provide the Student with an educational benefit. No expert has testified in this matter that the proposed IEP is inadequate with respect to addressing the Student's educational problems related to his specific learning disabilities. (F90; F146)<sup>24</sup>
  - d. The Kildonan recommendation made by PPS is based on application of an optimization standard, and therefore is not a proper basis for a finding that the proposed IEP fails to comply with the requirements of the IDEA with respect to educational problems because it is not reasonably calculated to provide an educational benefit to the Student. (F87, F96)
15. The Student has been identified previously as having a Major Depression and is now identified as dysthymic.<sup>25</sup> The Student's dysthymia (sometimes referred to in the documents and in the testimony inaccurately as a "depression") has been treated with medication over the past several years. (F122) However, the evidence does not warrant a finding that placement at Kildonan is required because the Student's

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schooling and level of intelligence. Associated features include "demoralization, low self-esteem and deficits in social skills" and a higher school drop-out rate.

<sup>24</sup> Various letters from Dr. Lane, Kildonan's Academic Dean, purport to substantiate the Student's need for a continued placement at Kildonan for educational reasons. Dr. Lane was not offered as a witness and, as the Parent was advised at the first day of hearing, if Dr. Lane was not offered as a testifying witness the substantive opinions expressed in his letters would not be admitted into the record as evidence of the truth or validity of the matters asserted.

<sup>25</sup> The DSM-IV-TR identifies the essential feature of a Dysthymic Disorder as a "chronically depressed mood" associated with at least two or more of the following features: disturbances in appetite, disturbances in sleep, low energy or fatigue, low self-esteem, poor concentration and feelings of hopelessness. Although the symptoms of a Major Depression are similar to that of Dysthymic Disorder, the primary factor for differential diagnosis is that the depressive symptomatology in a Dysthymic Disorder is chronic and pervasive but less severe or acute than in a Major Depression, whereas in a Major Depression the symptoms are severe and are clearly distinguishable from the person's usual functioning. (HO2, at 378-380)



dysthymia interferes with his educational performance and cannot effectively be treated other than at Kildonan.

- a. PPS concluded that at present the Student was dysthymic and not suffering from a major depression. (F86) PPS did not recommend Kildonan as a placement because the Student's dysthymia was such it could not effectively be treated outside of Kildonan or would prevent the Student from making meaningful educational progress in a mainstream setting with special education support as proposed in the 2003/2004 IEP.<sup>26</sup>
- b. Even assuming that the Student's dysthymia was the or a basis for PPS' recommendation for a placement at Kildonan, dysthymia is a clinical rather than educational problem and Kildonan is an educational environment with no clinical component and therefore is not an appropriate placement to address the Student's dysthymia. (F110, F125, S10, which describes Kildonan as a school for dyslexic children)
- c. In any event, there is no evidence that the Student's dysthymia is actually interfering with his performance at school at this time. PPS concluded that the Student's dysthymia and emotional state has interfered over the years with his performance on *standardized tests* reflected in the results of the myriad of psycho-educational assessments he has had over the years. (F86, F87) However, PPS did not conclude that the Student's dysthymia was currently interfering with his *academic performance*. Rather, PPS noted that attentional and emotional factors are likely to prevent the Student from attaining his maximum educational potential and the Student was at risk for a future depression, such that his emotional state should be monitored. (F87, F89, F92)
- d. The PPS report indicates that the Student is not viewed by others and does not view himself as having serious psychopathology. (F61ac – F61ah; F61aj)
- e. The Kildonan records, which include teacher observations of the Student over the past two academic years, do not indicate that the Student's dysthymia is manifesting in the classroom or school environment. (F48, F49, F57, F59, F60)
- f. Ms. Shuptar opines in her capacity as a clinician that the Student has become increasingly depressed and potentially suicidal since December 2002, and suggests that a continued placement at Kildonan is required for this reason. Although it is likely that the Student has become increasingly unhappy or anxious about the prospect of leaving Kildonan, her claims appear to be overstated in light of the fact: (1) that PPS was not told by the Parents about the Student's increased suicide risk as part of the March 2003 evaluation; (2) the

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<sup>26</sup> PPS also did not identify dysthymia as a potential basis for identifying the Student as eligible to receive special education and related services. (F61al - F61am)

PPS evaluation which included assessments with projective psychological testing, did not uncover any increased suicide risk or current suicidal ideation; (3) the Kildonan records show no evidence of concerns regarding suicide or depression; (4) no recommendation for a residential placement for depression or suicide risk has been made; (5) the Student is not currently in counseling with Ms. Shuptar notwithstanding this potential suicide risk; (6) there was no communication between Ms. Shuptar and Kildonan during this period regarding the Student's emotional state or suicide risk; (7) Ms. Shuptar views his refusal to participate in counseling as reflecting a "denial" of the impending transfer to NFHS which in turn is the purported trigger for the increased suicide risk, yet the Parents appear content to not compel the Student to participate in counseling for this issue at this time, presumably based on Ms. Shuptar's recommendations as to how to approach his refusal to participate in counseling; and (8) the Parents did not raise suicide risk as an issue at either PPT, but rather presented it for the first time through Ms. Shuptar's testimony at hearing. (F70-F74, F77, F81)<sup>27</sup>

16. The Student has also been identified as having ADHD over the past several years, although not consistently. However, the evidence does not warrant a finding that placement at Kildonan is required because the Student's ADHD interferes with his educational performance and cannot effectively be treated other than at Kildonan.
  - a. No expert has opined that the Student's ADHD will prevent him from making meaningful educational progress in a mainstream educational setting with special education support, or is such that the proposed IEP is not reasonably calculated to provide him with educational benefits.
  - b. No expert has opined that the Student's ADHD is such that absent a placement at Kildonan he cannot make meaningful educational progress because of the ADHD. In fact, the Student's ADHD is not even being treated clinically at this

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<sup>27</sup> The Parent also submitted in connection with this hearing (but not the May or June 2003 PPTs), a June 19, 2003 letter from Dr. Ligorski, who is treating the Student's depression. (S9, at 5) As with Dr. Lane, however, Dr. Ligorski was not offered as a testifying witness and therefore his letter has not been admitted into the record as evidence of the truth of the matters asserted therein. Dr. Ligorski, a medical doctor who does not appear to have any credentials which would enable him to render such an opinion, states in his letter that the Student requires a continued placement at Kildonan for educational reasons. His letter also states that he and Ms. Shuptar work together to provide services to the Student, with Dr. Ligorski providing medication management and Ms. Shuptar providing counseling services. Presumably, he would be aware of Ms. Shuptar's concerns regarding the Student's suicide risk. However, nowhere in his letter does he describe the Student as being at an increased suicide risk, mention suicide or even state that the Student's depression has recently become more acute.

time, and has not been treated clinically for several years. (F122) Moreover, Kildonan is not a facility which is able to clinically treat ADHD or even specializes in students with ADHD, although undoubtedly a percentage of its students are diagnosed with ADHD and various components of its program are designed to address the ADHD-related needs of its students. (S10)

- c. PPS did not recommend that the Student attend Kildonan because of his ADHD, although several of the PPS recommendations (most notably concerning class size) reflect efforts to structure an educational environment for the Student in light of his ADHD. The PPS assessment reveals that the Student's ADHD is not manifesting in a consistently recognizable way across all environments, and may in fact not manifest at all in some school environments.
  - d. The Kildonan records over the past two years reflect what appear to be ADHD-related behavioral problems, but these do not appear to be serious, do appear to have ameliorated over time, and have not substantially interfered with his educational progress over all. (F48, F49, F57, F59, F60)<sup>28</sup>
17. Both PPS and Shuptar opine that the Student requires a continued placement at Kildonan essentially because his self-esteem and self-confidence regarding his abilities as a Student have greatly improved at Kildonan and he will not be successful at NFHS because, based on his "terrible" educational experience in kindergarten, 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grades in the Board's schools, he does not believe he can succeed at NFHS and will therefore "shut down" by which they mean he will make himself unavailable for learning and will not otherwise participate in his educational program. They identify this as a "self-fulfilling prophecy." A self-fulfilling prophecy is a psychological construct and occurs when a person believes that a particular outcome is inevitable and either consciously, subconsciously or unconsciously makes decisions or takes actions which increase the likelihood that the expected outcome will occur. (F61ao-F61ar, F71, F76, F86, F89, F94, F96)<sup>29</sup> Self-esteem, self-confidence and self-fulfilling

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<sup>28</sup> It is also quite possible that at least some of these behavioral problems did not reflect ADHD, but rather reflected his adjustment to the Kildonan environment which was far more structured than his then-prior placement at New Hope Christian Academy.

<sup>29</sup> Ms. Shuptar testified that the Student is refusing to see her in counseling because he is in "denial" of the possibility of leaving Kildonan and would have to address those feelings if he were in therapy. In response to this denial, Ms. Shuptar (and the Parents) appear content to allow the Student to remain in denial and address the issue by giving the Student hope that he will be able to remain at Kildonan because the Parents will be able to secure funding from the Board for a continued placement. (F70, F71) Although the Hearing Officer is not a treating clinician for this family or for the Student and does not wish to second guess Ms. Shuptar's professional judgment, that choice has potentially left the Student ill-prepared to deal with a change in academic environments and may, ultimately, facilitate the end result of the self-fulfilling

prophecy problems are not, in and of themselves, disabilities within the meaning of the IDEA which would entitle a student to special education and related services. Further, to the extent PPS and Ms. Shuptar define “success” to mean that the Student will advance educationally at an optimal rate, their opinions are not a proper basis to make a finding in this case because the optimization standard is the wrong standard. The IDEA requires that the program be designed to enable the Student to make non-trivial, meaningful progress.

18. The evidence suggests that it is likely but not inevitable that the Student will have a difficult adjustment to and transition back to a public school setting and that his rate of educational progress at least initially is likely to be slower than in comparison to his rate of progress at Kildonan. That does not mean, however, that the proposed IEP fails to satisfy the substantive standards of the IDEA.
19. Based on the information available to it as of June 2, 2003, the Board’s proposed IEP for the 2003/2004 school year satisfies the substantive requirements of the IDEA because it is reasonably calculated to provide the Student with a nontrivial educational benefit in the least restrictive environment and is being provided at public expense. However, that finding does not mean that the IEP, or the manner in which it will be implemented, cannot or should not be enhanced or improved.
20. Pursuant to Conn. Gen. Stat. Sec. 10-76h(d)(1), the Hearing Officer has the authority, among other things, to “modify [the] educational placement of or the provision of a FAPE to the Student, to determine the appropriateness of a unilateral placement or to prescribe alternate special education programs for the Student.” Exercising the authority to “modify” a proposed IEP or its implementation is appropriate in this case for several reasons:
  - a. New information regarding certain of the Student’s needs was presented for the first time in hearing, and should not be ignored given its potential gravity.
  - b. The Student has not attended the Board’s schools for four years and it is reasonable to conclude that any initial proposed IEP would require some fine tuning as the Student adjusts to being in a new environment and the Board has had an opportunity to observe the Student’s performance in that environment.
  - c. The Student has not yet begun receiving services under the proposed IEP and therefore has not been harmed by any failure of the IEP as initially proposed to include the enhanced or improved features the Hearing Officer believes are necessary and desirable.
21. With these considerations in mind, the Hearing Officer now addresses the Parent’s

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prophecy: lack of success at NFHS. Several weeks have been lost in which the Student could have been addressing these issues in counseling, but was not.

substantive and procedural challenges to the proposed IEP. Substantive and procedural violations alleged in the Parents' "briefs" or testimony but not expressly identified or discussed below are denied due to lack of evidence and/or failure to state a claim remediable in this proceeding.

### **Substantive Challenges to the IEP Developed for the 2003/2004 School Year**

22. The Parents raise multiple substantive challenges to the IEP proposed for the 2003/2004 school year.
- a. **CLAIM:** Failure to place Student in a class size of only 5-7 children as recommended by PPS. (S2; S3) **CONCLUSION:** This claim is based on PPS' recommendation that the Student remain at Kildonan. That recommendation reflects PPS' conclusion that Kildonan represents an optimal learning environment for the Student. No expert applying the appropriate standard has in this case opined that the Student will be unable to make educational progress in a class that is larger than 5-7 students. Over the years prior to his placement at Kildonan the Student was making educational progress in classes of 16 or more students, regardless of whether the Student was receiving special education services or not. (F14, F15, F18, F22, F24, F27-F34, F38, F40, F42a, F42b, F42d) While it is possible that the Student's progress in a larger sized class will be somewhat less rapid than in a smaller sized class, that does not mean that the proposed IEP does not provide him with FAPE in the LRE.
  - b. **CLAIM:** The Board violated their rights to participate in the formulation of the IEP by failing to "mention" any of the Student's strengths or weaknesses. (S2 at 3)<sup>30</sup> **CONCLUSION:** The Hearing Officer understands this claim to be one that the IEP is deficient because the PPT failed to consider this information. The PPT considered at great length and in great detail the Student's strengths, weaknesses, level of functioning and capabilities. (*See, e.g.*, F65s)
  - c. **CLAIM:** Staff identified by the Board to provide the Orton-Gillingham services for the 2003/2004 school year are not qualified to do so. (S2, at 3) **CONCLUSION:** Ms. Gawlick, the Board employee responsible for providing direct Orton-Gillingham services to the Student, and Ms. Schutzmann, the Board employee responsible for providing consultation and indirect services, to the Student for the 2003/2004 school year at NFHS are qualified to provide those services. The Parents are correct that not all of the Student's teachers are qualified to provide Orton-Gillingham services; however, whether and to what extent that lack of qualification will prevent the Student from receiving a nontrivial educational benefit remains to be seen in light of the support the Student will

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<sup>30</sup> Although worded in the Parents' brief as a failure to consider the strengths and weaknesses of the Parents, the Mother at hearing testified that the claim actually pertains to the Student's strengths and weaknesses.

receive from Ms. Gawlick on a daily basis under the proposed IEP and the support Ms. Gawlick will provide to these teachers as explained by Mr. Dickau. (*See, e.g.*, F59) The Parent has not met her burden of demonstrating that that lack of training will produce that result.

- d. **CLAIM:** The June 2003 IEP was improper because the amount of special education hours were reduced from 11 hours/week (as set forth in the May 8, 2002 IEP) to 7.14 hours/week. (S2, at 5) **CONCLUSION:** The number of special education service hours to be provided to the Student in the 2003/2004 school year was determined on the basis of the Student's specific programming needs for the 2003/2004 school year. (Dickau Test.; Wiggins Test.) There is no requirement that service hours be increased from year to year or maintained at previous levels when doing so is not necessary to provide FAPE in the LRE.
- e. **CLAIM:** The refusal of the Board to pay for counseling of the Student by Dr. Ligorski and by Trina Shuptar as a "related service." (S4, at 2; S3) **CONCLUSION:** Dr. Ligorski has been providing medication management of the Student's depression for several years. There was no evidence that Dr. Ligorski provide any counseling to the Student. Since the Student's identified classification is a specific learning disability and not depression, the Board is not obligated to pay for the medical treatment of the Student's depression as a related service. Ms. Shuptar provided counseling to the Student from December 2002 through May 2003, but is not currently providing any such services and was not providing any such services as of the June 2, 2003 PPT. The Parent did not ask Ms. Shuptar to participate in the May or June 2003 PPTs and no documentation was submitted by her at these PPTs identifying an increased risk of suicidal ideation by the Student as a result of returning to NFHS. The May 28, 2003 letter that she submitted does not mention suicide risk. (B32, at 27) Based on the information available to the PPT, it was reasonable for the PPT to conclude that counseling with Ms. Shuptar was not required as a "related service." Based on information provided at this hearing, however, the Hearing Officer concludes that the June 2, 2003 IEP should be modified to include limited and focused counseling with Ms. Shuptar as set forth more fully below.
- f. **CLAIM:** The IEP is deficient because it only addresses reading and writing issues, does not address all of the Student's issues, and has "inadequate" math and mentoring objectives. (S2, at 5) **CONCLUSION:** The Parent alleges that the math objective is inadequate because of the size of the Student's math class. (F126) However, the Student will have a special education teacher or paraprofessional to support him in his math class, and therefore will effectively have small group or even potentially individualized attention in math. (F161) The Parent alleges that the mentoring objective is inadequate because it is not designed to address non-academic, emotional issues and requires the Student to determine and obtain the service on his own. (F127) That concern is belied by Mr. Dickau's testimony as to how the mentoring and counseling components will work and that these components are intended to address the emotional aspects of the Student's

reaction to placement at NFHS as well as educational issues. (F159, F169) The math and mentoring components of the IEP are reasonably calculated to provide the Student with a nontrivial educational benefit in the LRE.

### **Alleged Procedural Violations With Respect to Development of the IEP**

23. The Parents also claim that the proposed IEP was not developed in compliance with the procedural requirements of the IDEA.
24. The centerpiece of the IDEA's education delivery system for children with disabilities is the IEP, defined in 20 U.S.C. § 1401(a)(20), as a written program of instruction developed by the LEA and the parents which defines the services to be provided to the child and which must be based on the particular and unique needs of that child. The IEP must be reviewed at least annually, and more often as the child's needs warrant.<sup>31</sup> The IDEA's procedural requirements are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with LEA personnel in developing, reviewing and revising the child's IEP. Assuring meaningful parental participation is so central to the goals of the IDEA that a violation of the IDEA's procedural requirements may be a ground, in and of itself, for a finding that an eligible child has been denied FAPE.<sup>32</sup> However, not every procedural violation warrants a finding that the LEA has failed to provide FAPE or that an IEP is invalid. Rather, the procedural violation must be gross and result in a demonstrable harm – specifically the loss of a meaningful opportunity to participate by the child's representatives from which has flowed a deprivation of the child's entitlement to FAPE.<sup>33</sup>

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<sup>31</sup> Among other things, an IEP defines the child's present levels of educational performance, measurable annual goals for addressing the child's educational needs that result from the child's disability, and the individualized instruction and services that will be provided to help the child, and is the document upon which placement decisions are to be based. *See, e.g.*, IDEA, 20 U.S.C. § 1414(d); IDEA Regulation §§ 300.347; 300.552(b). Accordingly, the IEP must include the benchmarks or short-term objectives and supplementary aids and services required to enable the child to be involved in and progress in the general curriculum and extra curricular activities in the mainstream environment, or an explanation of the extent to which the child will not participate with nondisabled children in the mainstream environment and in extracurricular and other nonacademic activities. *Id.*

<sup>32</sup> *See, e.g., Hall*, 774 F.2d at 629 (repeated failure to notify the parents of their procedural rights to challenge the proposed IEP over a several year period deprived them of a meaningful opportunity to test whether the proposed IEP complied with the IDEA); *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992) (child denied FAPE where school developed IEP independently, without participation of child's parents or teachers).

<sup>33</sup> *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) (to invalidate IEP based on procedural violations "there must be

25. **CLAIM:** The May and June 2003 PPTs were not properly constituted because not all of the required members stayed for the entire PPT meeting on each of those days, in violation of IDEA Regulation §§ 300.44 and 300.346(d). More specifically, a regular education teacher was not present for the entire PPT on either May 7, 2003 or June 2, 2003, and that during the course of the June 2, 2003 the “majority” of the PPT team had left at some point during the PPT meeting. (S3, at 1)

**CONCLUSION:** IDEA Regulation § 300.344 provides that the LEA shall ensure that the IEP team for each child with a disability includes the parents, a regular education teacher, a special education teacher, an individual who can interpret the instructional implications of evaluation results, and a representative of the public agency qualified to provide specifically designed instruction to meet the unique needs of children with disabilities. IDEA Regulation § 300.346(d) states that the regular education teacher must as a member of the IEP team “to the extent appropriate participate in the development, review and revision of the child’s IEP . . .”

Neither IDEA Regulation requires that all members of the PPT be present throughout the entire PPT. In this case, the IEP was developed in a PPT meeting that took place over several hours on two different days and covered many different issues. It would be unduly burdensome to require that the entire PPT staff spend the entire time at such a PPT meeting. However, even if the Regulations require that all members of the PPT be present throughout the entire PPT, the Parents have failed to establish how the departure of any specific members resulted in the Student being denied FAPE in the LRE or their procedural rights being violated. There was no evidence that appropriate personnel were not present at those portions of the PPT concerning their areas of responsibility, or were otherwise not able to contribute their expertise to the formulation of the IEP. As to the main claim, a regular education teacher was present throughout both PPTs. (Dickau Test.)

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some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation educational benefits”); *Urban v. Jefferson County School Dist., R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (deficient IEP did not in that case amount to a denial of an appropriate education); *O’Toole By and Through O’Toole v. Olathe Dist. Schools Unified School District No. 233*, 144 F.3d 692, 702 (10th Cir. 1998) (“technical deviations” from the IDEA’s requirements do not necessarily “render an IEP entirely invalid”); *Briere v. Fair Haven Grade School Dist.*, 948 F. Supp. 1242 (D.Vt. 1996) (procedural violations resulted in denial of FAPE, where LEA inhibited meaningful parental participation, refused to discuss an alternative placement, failed to conduct supplemental evaluations, failed to advise the parent as to why a placement request was refused, delayed IEP team meetings and finalization of the IEP, and where student’s teachers did not attend IEP team meetings); *Logue By and Through Logue v. Shawnee Mission Public Sch. Unif. Sch. Dist. No. 512*, 959 F.Supp. 1338, 1348 (D.Kan. 1997) (absent prejudice caused by procedural violation, IEP need not be invalidated). See also *W.A. v. Pascarella*, 35 IDELR 91 (D. Conn. 2001) (discussing the applicable principles).



26. **CLAIM:** The Parents were improperly excluded from informal staff meetings regarding the Student that took place after each PPT in violation of IDEA Regulation § 300.50(a)(2) (S2, at 3) **CONCLUSION:** The specific meetings were: (1) a meeting between the Mother, Mr. Dickau and Ms. Hopkins after the May 7, 2003 PPT and, (2) a meeting between the Mother and Mr. Dickau after the June 2, 2003 PPT. (F128) Since the Mother was present at both meetings, there was no procedural violation.
27. **CLAIM:** The Board violated their right to participate in the PPT on June 2, 2003 by refusing to permit the Parents to read to the PPT the document entitled “A Portrait of [the Student].” (S2, at 3) **CONCLUSION:** There is no Regulation that requires the Board to permit a parent to read a document into the record of the PPT. Even if there was such a Regulation, the Parents were not denied a meaningful opportunity to participate in these PPTs on this ground as a factual matter. The Parent handed out a copy of the “Portrait” at the June 2, 2003 PPT and the information was available to all members of the PPT. Mr. Dickau initially declined to let the Parent read the entire document because a paper copy had been provided to each PPT member and the “Portrait” essentially repeated excerpts of the PPS Report. Mr. Dickau never told the Mother that she could not discuss the issues or subject matter of the “Portrait” and ultimately, at the end of the PPT, offered the Mother an opportunity to read the “Portrait.” She declined to do so. (F116)
28. **CLAIM:** The PPTs “refused” to “consider” the PPS Report and evaluation in violation of IDEA Regulation § 300.502(c)(1). (S2, at 4) **CONCLUSION:** Had the PPT refused to consider the PPS Report, this claim would have some merit. However, the PPS Report and evaluation was considered at length at the June 2, 2003 PPT. (F142, Dickau Test; Mother Test.) The PPT did not consider the PPS Report at the May 2003 PPT because the Parent did not have a “correct” copy of the PPS report and may have refused to allow the PPT to consider the PPS report at that time. (Hopkins Test.; Wiggins Test.; Mother Test.) To the extent that the Parent’s claim is that the PPT failed to *accept* the PPS recommendation regarding Kildonan, the Parents have failed to state a claim for a procedural violation.
29. **CLAIM:** The PPTs utilized test data from April 2, 2001 and May 2, 2002 in formulating the 2003/2004 school year IEP in violation of IDEA Regulation § 300.346(a)(1) (which requires use of the initial or most recent evaluation of the child). (S2, at 4) **CONCLUSION:** The Parents appear to base this claim on a statement on the IEP which indicated that the IEP was “written based on prior testing done by the district on 4/2/01 and 5/2/02” (S3, at 4) The fact that the June 2, 2003 IEP may have been written in part based on test results from April 2001 and May 2002 does not mean that the IEP violated IDEA Regulation § 300.346(a)(1). The Parent’s “brief” (S3, at 4) makes clear that the results of the PPS evaluation were discussed at the June 2, 2003 PPT. The testimony reveals that the Board developed the June 2, 2003 IEP with due and appropriate consideration of the PPS Report. A significant number of the recommendations from the PPS report have been incorporated into the proposed IEP.

30. **CLAIM:** The proposed IEP was “drafted outside of the PPT and not received until six days later.” (S2, at 5) **CONCLUSION:** The IEP was developed at the June 2, 2003 PPT. After that PPT, the Board reduced the results of the discussions at the PPT to a final written form and mailed it to the Parent on the 5<sup>th</sup> day after the PPT. The Parent could not identify any inaccuracies in the written IEP that she received, or any provision in the proposed IEP that had not been discussed at the PPTs. (Mother Test.) Once again, this claimed “procedural violation” is really nothing more than a claim that the proposed IEP fails to meet the IDEA’s substantive requirements.
31. **CLAIM:** The 2003/2004 IEP was improperly developed because “[a]ll modifications were already decided on and written before the June 2, 2003 PPT.” (S2, at 5) **CONCLUSION:** Board staff received the “corrected” PPS Report shortly after the May 7, 2003 PPT, reviewed it and prepared a working list of modifications which were then presented for use at the June 2, 2003 PPT to develop the final modifications that would be implemented. There was an extensive discussion of the required modifications, and a list of modifications was ultimately developed at the PPT based on that discussion. (F157, F158)
32. **CLAIM:** The 2003/2004 IEP is improper because it is “identical” to the May 8, 2002 IEP except for the addition of the mentoring goal.” (S2, at 5) **CONCLUSION:** That the two IEPs may be similar or even identical does not mean that the June 2, 2003 IEP failed to provide the Student with FAPE in the LRE. As a legal matter, the question is not whether the two IEPs are identical, but rather whether the June 2, 2003 IEP provides the Student with FAPE in the LRE. As a factual matter, the Student’s circumstances have not changed since May 8, 2002 in the sense that neither the nature nor extent of his disabilities have changed, and no new disabilities have been identified. Accordingly, that the two IEPs are similar is not dispositive of anything.
33. **CLAIM:** The Board violated their rights to participate in the formulation of the IEP by failing to reconvene the June 2, 2003 PPT to “complete the process.” (S2, at 3) **CONCLUSION:** The Parent treated the PPT as concluded on June 2, 2003 even though she apparently believed that not all items had been addressed. She rejected an opportunity to reconvene the PPT to complete anything that remained outstanding, such as the question of ESY. (F117)
34. **CLAIM:** The Board failed to provide “prior written notice of an action taken/refused at a PPT” by failing to provide the Parents with written notice *prior* to the June 2003 PPT that the Board would: (1) refuse to place the Student in a small class; (2) refuse to provide Orton-Gillingham for all academic areas with teachers who were trained at the associate level or higher; (3) refuse to provide 1-1 language arts with Orton-Gillingham trained teacher every day for 45 minutes; (4) refuse to provide 1:1 math; (5) refuse to waive the foreign language requirement; and (6) would provide the Student with challenging honors materials but not in an honors class placement.” (S2, at 6) **CONCLUSION:** The Parents do not identify the specific Regulation which supports their claim, but they appear to be relying on IDEA Regulation § 300.503(a). The purpose of this Regulation is to assure that the Parents have sufficient notice of a

proposed action of an LEA with respect to an IEP so that they can exercise their procedural due process rights to have the appropriateness of that proposed action assessed by an administrative hearing officer. The Board used the State standard form IEP minutes, which includes the Prior Written Notice page, which was properly completed in this case and sent to the Parents with the PPT minutes. Accordingly, the Board has satisfied the requirements of the "prior written notice" regulation. Moreover, the Board could not have provided notice of these actions to the Parent prior to the June 2, 2003 PPT, because the decisions at issue were made at the June 2, 2003 PPT. The Parent promptly challenged these decisions by commencing this due process proceeding and therefore, even assuming the Board should have provided them with prior written notice of these actions in addition to the PPT minutes or the IEP, the Student has not sustained any actual injury or harm by this alleged procedural violation.

35. **CLAIM:** The Parents' procedural rights were violated by the Board's failure to provide Dr. Lane with written notice of the June 2, 2003 PPT. (S2, at 2) **CONCLUSION:** The Board mailed three notifications regarding the June 2, 2003 PPT to Dr. Lane who claimed he did not receive them. (B35, F155, F171) An effort was made to include Dr. Lane in the June 2, 2003 PPT by teleconference but he was not available. The Parent did not object to continuing the PPT in Dr. Lane's absence. Dr. Lane participated for more than 1 hour at the May 7, 2003 PPT and the Parent testified that he had provided extensive information to the PPT. (F107, F117; Mother Test.; Dickau Test.) Accordingly, other than discussing his recommendation regarding ESY, belatedly and inexplicably made for the first time after the May 7, 2003 PPT (B63), Dr. Lane had nothing further to offer the PPT and his absence at the June 2, 2003 PPT did not violate the Parents' procedural rights.
36. **CLAIM:** The Board's attorney humiliated, embarrassed and tried to intimidate the Mother by asking her "without justification" not to speak "while others were talking." (S2, at 7) **CONCLUSION:** In explaining this argument further in their "brief" (S3, at 6) the Parents appear to be arguing that it was improper for the Board's attorney to attend the PPT meeting because he does not "have an intense interest in the child." While the Hearing Officer agrees that the presence of either party's attorney at a PPT meeting can be problematic because of the "chilling effect" the presence of the attorney might have on the discussion, nothing in the IDEA prohibits a party from bringing an attorney with them. The Parent offered no testimony as to exactly what the Board's attorney allegedly did, but in any event the Parent does not allege that the Board's attorney prevented her from advocating at the PPT on behalf of the Student and, in fact, the Parent apparently had the "floor" for almost 50% of the June 2, 2003 PPT. (F154)

### **Reimbursement for the PPS Evaluation**

37. The Parents request reimbursement for the PPS evaluation on the ground that it was an independent educational evaluation considered by the June 2, 2003 PPT. (S3, at 5, 15; S16 at 1)

38. The Parents cite IDEA Regulation § 300.502(c)(1) to support this claim. That Section provides that “If the parent obtains an independent educational evaluation at private expense, the results of the evaluation – (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.” This Regulation has nothing to do with reimbursement for a parent-initiated evaluation.<sup>34</sup>
39. The Parents also cite IDEA Regulation § 300.503(b) to support their claim for reimbursement of the PPS evaluation. That Section provides that a parent has a right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the LEA or the LEA fails to conduct an evaluation where it was obligated to do so.
40. The Parents obtained the PPS evaluation because they had then recently had the Student’s sister evaluated by PPS and wished to have as thorough and comprehensive an evaluation done of the Student in light of the problems he was having in early 2003 and in anticipation of planning for the 2003/2004 school year. (F134) The Parents did not obtain the PPS evaluation because the Board had refused their request to evaluate the Student or because they disagreed with an evaluation the Board had obtained.
41. The PPS report itself (F61) is devoid of any evidence that the Parent was making the request for an evaluation because they disagreed with a Board evaluation. Presumably, PPS would have identified that as the purpose or a purpose of the evaluation and would discuss the deficiencies of the Board’s evaluation with which the Parents disagreed. There is no such information or statements in the PPS Report.

#### **Technical Deficiencies with the IEP**

42. The Parents allege that the IEP is technically not compliant with the requirements of the IDEA as follows:
- a. No date was set for a triennial review. (S2, at 5) The Parents are correct.
  - b. The goals and objectives are not properly documented through current levels of functioning, percentage improvement, use of standardized assessments rather than subjective measures, in violation of §§ 300.347(a)-1(i), (2)(i)(ii), (3)(i). (S2, at 6) They are correct as to Goals 1 and 4 of the proposed IEP.

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<sup>34</sup> This claim implicitly assumes that the Board considered the PPS evaluation in formulating the 2003/2004 IEP. The Parent claims elsewhere that the Board violated their procedural due process rights by failing to consider the PPS evaluation. A party cannot have it both ways.

43. Although the Hearing Officer agrees that the IEP is technically deficient in these respects, those deficiencies do not warrant a finding that the educational program as a whole proposed in the June 2, 2003 IEP fails to provide FAPE in the LRE or entry of an order that the Student be placed at Board expense at Kildonan. This is particularly true given that these technical deficiencies can be corrected prior to the time that the Student enters the program outlined in the IEP, the Student's educational interests have not been harmed by these technical deficiencies, and these deficiencies do not appear to have been *a* reason for the request for placement at Kildonan, much less *the* primary or motivating reason for the request.

### **ESY Services for the Summer of 2003**

44. The Parents allege (S2, at 2) that the Board failed to provide the Student with FAPE in the LRE in violation of IDEA Regulation § 300.309 by failing to provide ESY services for the summer of 2003 in light of Dr. Lane's letter (B63) recommending ESY services.
45. "Extended school year" or "ESY" services means special education and related services provided to a child with a disability beyond the LEA's normal school year in accordance with the child's IEP at no cost to the parents. ESY must be provided only if a child's IEP team determines, on an individual basis, in accordance with 34 C.F.R. §§ 300.340-300.350, that ESY services are necessary to provide that child with FAPE. 34 C.F.R. § 300.309. There is no requirement that ESY be made a part of every eligible child's IEP even if doing so would provide the child with some educational benefit. *See, e.g., Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir., 1990), *cert. denied*, 500 U.S. 905 (1991) (ESY services must be provided to a child if that is the appropriate educational experience for that child's situation). The party requesting ESY must "demonstrate[,] in a particularized manner relating to the individual child, that an extended school year program is necessary..." to provide FAPE. *See, e.g., Codrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990).

The factors which must be examined when considering if a student should receive ESY services include but are not limited to: (1) nature of the student's disability; (2) severity of the student's disabling conditions; (3) areas of learning critical to attaining the goal of self-sufficiency and independence from caretakers; (4) ability of the child's parents to monitor programming and prevent regression; (5) extent of anticipated regression or recoupment; (6) availability of alternative resources; (7) ability of the child to interact with nondisabled children; (8) area of child's curriculum which needs continuous attention; and (9) whether requested service was extraordinary to the child's condition as opposed to an integral part of a program for those with the child's condition. *See, e.g., Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1980), *on rem'd* 513 F.Supp. 425 (E.D.Pa. 1981); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983). A primary

factor in the analysis is “[t]he amount of [anticipated] regression suffered by a child during the summer months, considered together with the [anticipated] amount of time required to recoup those lost skills when school resumes in the fall.” *Johnson*, 921 F.2d at 1027 (considering whether the benefits accrued to the child during the regular school year will be “significantly jeopardized” absent ESY services). Another important factor is whether ESY is needed to support “emerging skills and breakthrough opportunities.” *Reusch v. Fountain*, 872 F. Supp. 1421, 1435 (D.Md. 1994).

46. The Board’s handling of the request for ESY at the June 2, 2003 PPT may have violated the Student’s due process procedural rights. This is literally a “he said – she said” dispute between the Mother and Mr. Dickau, and the credibility of both witnesses is equally suspect. (F018, F117, F128, F168, Dickau Test.) In any event, the issue of ESY appears to have been discussed at the June 2, 2003 PPT and both parties agree that the Mother was offered an opportunity after that PPT to have the issue addressed, but declined to accept that offer. Ms. Wiggins opined that the Student did not require ESY. Neither PPS, in its evaluation report or at hearing, opined that the Student required ESY services, or identified any breakthrough or emerging skills that required reinforcement over the summer. Ms. Shuptar is not qualified to render such an opinion but, in any event, did not testify that the Student required such services. Dr. Lane’s May 27, 2003 letter (B32, at 26), which was considered by the PPT, states that the Student was working on various skills as of the end of the 2002/2003 school year and that absent summer tutoring he was “likely to lose ground.” Dr. Lane’s letter does not identify these skills as emergent or breakthrough skills, and fails to state whether and to what extent regression would occur or that satisfactory recoupment could not be made at the beginning of the 2003/2004 school year. Accordingly, it is likely that had the Board correctly handled the ESY issue on the merits, the PPT would have appropriately concluded that ESY was not required. In any event, however, the Parent has failed to establish that the Student required ESY or was harmed by the failure to provide it.

### **Issues Regarding Records Requested by the Parents**

47. In connection with this due process hearing, the Parents asked the Board to produce copies of the Student’s records dating between June 2002 and May 2003. They were expecting to find copies of notes taken by Ms. Hopkins of the December 2002 visit to Kildonan and meeting with the Student, as well as other documentation evidencing communications between the Board and Ms. Wiggins regarding the Student. When they reviewed the records, no such documents were found even though the Mother had observed Ms. Hopkins making notes of the December 4, 2002 meeting. The Mother was told no such records exist. The Parents allege that the Board has violated their procedural due process rights.
48. Ms. Wiggins testified that she did not make any notes of the December 4, 2002 meeting, but believes Ms. Hopkins did.

49. Ms. Hopkins took some brief personal notes out of habit at the December 4, 2002 meeting, but discarded them shortly after the meeting. (F99)
50. Ms. Hopkins testified that there were no other written records of communications between the Board and Ms. Wiggins regarding the Student during the period at issue.
51. Given the above testimony, the Board did not improperly refuse to provide records in its files to the Student in connection with this due process hearing. Moreover, the remedy for any such failure would not be a placement at Kildonan.

## **ORDERS**

- A. Within five business days of the date on which the Board receives this Final Decision and Order, the Board is to submit to the Parent a version of the June 2, 2003 IEP (Exhibit B32, at 1-17) revised: (1) to identify the date of the next triennial review; and (2) to state the 80% success target for Goal # 1 and the Objectives thereunder.
- B. Because the PPS Report recommendations are far too detailed to translate easily into an IEP or list of classroom modifications, all NFHS teachers and educational or clinical staff working with the Student should be given a copy of the recommendations portion of the PPS Report (B31, at 36-41) on or by the first day that the Student physically attends NFHS in the 2003/2004 school year to assist them in understanding the types of accommodations and programming that would be beneficial to the Student. By no later than the first week that the Student physically attends NFHS in the 2003/2004 school year, Mr. Cooney and Ms. Gawlick shall speak individually to each of these staff members to answer any specific questions they might have and to assure that these staff understand that Mr. Cooney and Ms. Gawlick are available to answer any other questions that might arise over the course of the year regarding those recommendations.
- C. Provided that the Student begins physically attending NFHS in September 2003, at the next PPT convened thereafter regarding the Student, but in no event later than January 30, 2004, the Board shall evaluate the appropriateness and implementation of Goal # 4 as written and revise the IEP to state specific objective measures for success under that Goal and its related Objectives. If the Student begins physically attending NFHS in the 2003/2004 school year at some point other than in September 2003, the evaluation contemplated in this paragraph should take place once adequate data is available but by no later than 4 months after he physically begins attending NFHS.
- D. For the period through January 30, 2004 and provided that the Student is physically attending NFHS, the mentor/case coordinator shall contact the Parents by telephone or in writing no less than once every two weeks, and more often if

warranted, to report on the Student's performance and progress under the IEP.

- E. In light of information presented at hearing regarding the Student's potentially increased suicide risk, his difficulties in developing trust relationships, and concerns expressed by PPS regarding the potential for the Student to slide from dysthymia to a major depression associated with leaving Kildonan, the Board shall pay for up to 12 therapy sessions for the Student with Ms. Shuptar at the rate Ms. Shuptar has historically charged for individual sessions for the Student (without regard to any insurance reimbursement). That rate shall be specified in advance. Payment for each particular session shall be conditioned on satisfaction of the following requirements: (1) the Student is physically attending NFHS as of the date of the session; (2) the session took place in the period through January 30, 2004;<sup>35</sup> (3) the focus of the session is the Student's concerns, reactions, or issues with the transition to NFHS or his adjustment to NFHS, including but not limited to his self-esteem and self-confidence as a student at NFHS; (4) the Parents authorize the Board and Ms. Shuptar to discuss the subject matter of the treatment sessions; and (5) within 3 business days of any such session, Ms. Shuptar contacts the Board to discuss the subject matter of the session, including but not limited to the Student's then-current suicide risk and depression level and any intervention being implemented by Ms. Shuptar. The Board shall identify a specific employee to whom Ms. Shuptar is to provide this information. That employee will have the discretion to share the information with other Board employees who need to know the information, and the Parents (if they desire reimbursement) shall sign all necessary releases to enable the information to be shared among staff. Assuming that the Student is physically attending NFHS as of that date, at a PPT convened no later than January 30, 2004, the parties shall determine whether and to what extent counseling with Ms. Shuptar should remain a component of the Student's program for the balance of the 2003/2004 school year and under what terms and conditions.
- F. By no later than the first day the Student begins physically attending NFHS in the 2003/2004 school year, and preferably before that point, the Board shall identify to the Student and the Parents the case coordinator and mentor for the Student. On or by the first day that the Student begins physically attending NFHS in the 2003/2004 school year, the Student shall be personally introduced to the mentor, the case coordinator, Ms. Gawlick, Mr. Cooney, the NFHS nurse, Mr. Dickau, Ms. Hopkins and any other guidance counselor, vocational counselor, school social worker or school psychologist working at NFHS. The purpose of these meetings is to introduce each provider to the Student, provide information to the Student as to the support that each of these persons can offer, where these persons are located in the building and how they can be accessed by the Student. This information

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<sup>35</sup> In other words, if in this period the Student has only two sessions, the Board shall pay for those sessions; if the Student has 20 sessions, the Board shall only be required to pay for 12 of them.



should also be provided in writing to the Parent and the Student. The identity and role of the mentor or case coordinator, and the operation of the mentoring/counseling component of the 2003/2004 IEP should also be explained to the Parent and the Student and each of these individuals as well as the regular and special education staff working with the Student, again preferably in writing, and should reflect the parameters set forth in Mr. Dickau's testimony.

- G. The August 8, 2003 order regarding stay put is hereby modified such that implementation of the stay put IEP is to include the requirements of Orders B, C, D and F of this Final Decision, again provided that the Student is physically attending NFHS.