

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. West Hartford Board of Education

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Appearing on behalf of the Board: Attorney Frederick L. Dorsey
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Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board offered an appropriate program for the Student for the 2005-2006 school year.
2. If not, whether the program and placement at Franklin Academy is an appropriate program to meet the Student's educational needs for the 2005-2006 school year.
3. Whether the Board is financially responsible for the program and placement for the Student for the 2005-2006 school year.

SUMMARY:

This 17 year old Student began to attend the Board schools in October 2003, at which time he was eligible for special education and related services as other health impaired – ADD/ADHD. The Student attended only 16 days of school from October through the end of 2003, at which time the Parent unilaterally placed the Student at a private therapeutic school for the remainder of the school year. After an unsuccessful placement at that school, the Parent placed the Student at another private school for the 2004-2005 school year. In April 2005, the Student was dismissed from the private school due to his failure to meet the attendance policy, inability to sustain the effort to handle the curriculum and failure to meet the academic standard. The Board provided homebound tutoring for the remainder of that school year.

In late spring and summer 2005, a neuropsychologist conducted an evaluation of the Student, and concluded that the Student has a nonverbal learning disability, and a secondary attention deficit hyperactivity disorder.

The Board offered the Student a program at one of its high schools for the 2005-2006 school year. The Parent rejected the proposed program and placed the Student at Franklin Academy. The Parent seeks reimbursement for this placement.

PROCEDURAL HISTORY:

The Board received this hearing request filed on behalf of the Parent on August 10, 2005. The Parent's attorney and the Board's attorney submitted requests for extensions of the mailing date of the decision based on assertions that additional hearing dates were required to present their case, which were granted. The mailing date was further extended by request of the parties so that they had sufficient time to file final briefs. Briefs were filed on January 23, 2006.

The Parent's witnesses were Cristina Ciocca, Psy.D.; the Mother; and Seymore Thomas Hays III, educational director at Franklin Academy.

The Board's witnesses were Marie Callahan, Board special education resource teacher; Clare Kennedy, Board department supervisor in pupil services; Scott Ratchford, Board school psychologist; Joanne O'Neill, Board supervisor of special education; and Glenn McGrath, Board director of pupil services.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

FINDINGS OF FACT:

1. The Student is 17 years old, and is attending Franklin Academy, a private school in East Haddam, CT.
2. The Student attended Independent Day School, a private school in Middlefield, Connecticut, from pre-kindergarten through sixth grade. [Testimony Mother]
3. When the Student completed sixth grade, he entered the public school, attending Frank Ward Strong Middle School at Regional School District No. 13 for seventh and eighth grade. In seventh grade, the Student was identified as eligible for special education as Other Health Impaired-ADD/ADHD. [Testimony Mother]
4. At the conclusion of the eighth grade year, the Family moved to West Hartford subsequent to the Parents' divorce. For ninth grade, the Parent enrolled the Student at Watkinson School, which was the private school his brother attended.

- The Parent described this school placement as an academic disaster for the Student, although he did make friends at the school. After about five weeks in attendance, the Parent and the teachers agreed that the Student would not continue at Watkinson. [Testimony Mother]
5. In mid-October 2003, the Student enrolled in the Board public schools at Conard High School. [Exhibit B-29] At the time of enrollment, the Parent signed the special education form which indicated that the Student would not require a planning and placement team [PPT] meeting prior to his starting at the Board schools. [Exhibit B-30] When the Student entered the Board schools, the Board provided special education services to the Student based on the IEP from his prior public school. [Testimony Ms. Callahan]
 6. According to the Parent, the Student did “dramatically poorly” at Conard High School. He struggled academically. The Student reported to the Parent that he was ostracized and thought the environment was hostile. The Student reported that he was teased by other Students, and spent his time alone at the school. The Student became more school avoidant, and the Parent had difficulty persuading the Student to attend school. The Parent reported her concerns about the Student to the school psychologist. The Student reported to the Mother that he felt like someone who was floating around in the water, treading water. One day, when the Parent brought the Student to school, he refused to go, broke down and said that while he didn’t want to kill himself, because he knew what it would do to the Parent and his brother, he said that the only way out would be to take his life. The Parent took the Student to his private therapist that day. [Testimony Mother] The record reflects that the Student was in great distress at this time.
 7. The Student’s special education resource teacher noted that the Student didn’t interact with the other four to five students in the classroom. The Student’s resource time was scheduled for the first period of the day. At this time, the Student was often late to school, so he missed his resource period. The special education teacher noted that the Student was having a hard adjustment to Conard, and that she was aware the Student was having a hard time getting out of bed and coming to school. This was also a time when the Student was dealing with stressful changes in his life, including health issues with his mother and his brother. The Student told the teacher that he didn’t see his father either, which was another loss that the Student was dealing with at that time. [Testimony Ms. Callahan]
 8. The Student did not do well in the special education resource room classroom. He had productivity and focus issues. The teacher noted that the Student would stare at a question or problem for long periods of time when he was in the resource room. [Testimony Ms. Callahan]
 9. On November 12, 2003, a PPT meeting was convened. At that meeting, the team members agreed that the Student would be provided special education through the

- special education resource teacher tutorial 10 times per week, with counseling on a consult basis. [B-34] This increased the resource room time to two periods per day. [Testimony Ms. Callahan] Triennial testing was planned, and the PPT agreed to meet upon completion of the testing. The three goals for the Student were that the Student will demonstrate improved academic achievement with passing grades in all subjects, the Student will develop the organization skills necessary for school success and that the Student will begin career exploration. [Exhibit B-34]
10. The school psychologist completed his evaluation of the Student in December 2003. The Student's performance on the WISC III indicated intellectual ability in the high end of the average range. The Student standard scores were 122 verbal IQ, 102 performance IQ and 113 full scale IQ. The teacher's report on the Behavior Assessment Checklist for Children (BASC) indicated behavior patterns that placed the Student in the at-risk range for internalizing behavior and adaptive skills. The Student's scores for both depressive symptoms and somatic complaints were elevated. One of the teachers indicated that the Student's study skills were poor enough to rise to the level of clinical significance. [Exhibit B-35]
 11. The school psychologist did not receive the Parent's BASC form by the time he completed his evaluative report, and the school psychologist does not recall taking any steps to follow up to obtain the form from the Parent. Thus, the only BASC completed, other than the Student's self report, was by teachers who had minimal contact with the Student. This lack of follow up, and reliance on a BASC completed by teachers with such minimal contact with the Student was concerning, indicating that the BASC results were not fully reflective of the Student's needs and concerns. [Testimony Dr. Ratchford]
 12. It was also of concern that the school psychologist indicated in his report that some of the Student's behavior warranted further analysis, and that many of the symptoms that the Student articulated were consisted with depression, although he noted in his report that "no firm diagnosis is possible from the limited data available." If "limited data" was available, the school psychologist could have taken the appropriate and necessary step of obtaining the additional information and data that were lacking. By these comments in the report itself, it cannot be found that the Board conducted a comprehensive evaluation of the Student at that time. The Board was remiss in not conducting further evaluations at this time, to obtain an appropriate and comprehensive evaluation of the Student.
 13. The Board also conducted an educational evaluation of the Student as part of his triennial evaluation. The evaluator concluded that the Student had "long-range difficulties with attention and work completion." The assessment concluded that the Student demonstrated superior oral language skills, and his performance in reading and written language was within the average range. The evaluator further noted that the Student had difficulty formulating sentences based on prompts or generating simple sentences on a timed task. The Student demonstrated weak

- math skills, having difficulty with basic computation. The evaluator noted that the Student's command of math facts was below average for his age. [Exhibit B-37]
14. The PPT convened on December 22, 2003 to review the results of the triennial evaluation. The Board proposed a program which included 7.5 hours of services per week from the special education resource teacher in the resource room, and a half hour of counseling per week. While assistive technology was indicated as "required" on the IEP form, no assistive technology evaluation was completed and no further explanation of this assistive technology was included in the IEP. [Exhibit B-38] As a result of the evaluations, and in spite of the Student's attendance issues and obvious distress, the only change to the Student's IEP was the addition of a half hour of counseling per week.
 15. The December 22, 2003 IEP included only one goal. This goal provided: [The Student] will utilize school based resources to effectively cope with emotional concerns affecting academic performance. The objectives for this goal included (1) [The Student] will ask to see the school psychologist when emotional issues are affecting his work production or quality; (2) [The Student] will demonstrate knowledge of effective coping strategies; and (3) [The Student] will employ coping strategies to aid him in producing academic work consistent with his ability level. [Exhibit B-38]
 16. At this PPT meeting, the Parent indicated that she was having difficulty getting the Student to attend school. At this point, from October 23 to December 22, the Student had attended 16 days of school, and, of those 16 days, the Student frequently arrived late for school. The Student's ability to obtain educational benefit and be successful in his program at the Board high school was impeded due to these attendance patterns. [Testimony Ms. Callahan] The Board failed to address these attendance/school avoidance issues at this time.
 17. Over the Christmas break in 2003, the Parent, in consultation with the Student's therapist, decided to place the Student at The Webb School at the Institute of Living. The Student attended the Webb School from January to June 2004. [Testimony Mother] The Webb School is described as a private therapeutic school affiliated with the Institute of Living/Hartford Hospital. [Exhibit P-3]
 18. The Student did not progress well academically at the Webb School. In his fourth quarter the Student received an F in English and physical education, a D+ in geometry, a C- in science, a C+ in computers and a C in vocational class. Notes included in the Student's report card indicated that the Student failed to complete assignments and failed to hand in homework. The Student continued to have extensive absences at this placement, according to the school records. [Exhibit B-59]

19. The PPT convened on May 28, 2004 to review the Student's educational status and determine an educational plan and placement for him. The Parent provided the members of the PPT with a handwritten status note from Robert Sahl, M.D., the consulting child and adolescent psychiatrist to the Webb School. In the correspondence, Dr. Sahl recommended that the Student have a highly structured and supervised educational environment that is also intellectually challenging and one that understands individuals with ADHD and learning issues, and can assist in helping the Student be accountable for work completion. Dr. Sahl also recommended that there should be therapeutic interventions available at the school, and that the Student should be provided regular individual therapy sessions. [Exhibits B-52, P-1]
20. The minutes of the PPT meeting reflect that the Student's "ADHD significantly impacts his performance." It was noted that the Student's pacing is slow, he can be disorganized, he appears somewhat depressed, and that emotional factors impact his ability to progress educationally. [Exhibit B-52]
21. At this PPT meeting, the Parent requested that the Board reimburse her for the placement at the Webb School, which was rejected. The Parent requested that the Board pay for a residential therapeutic residential placement for the 2004-2005 school year, which was also rejected. [Exhibit B-52]
22. The goals and objectives set forth in the Student's Individualized Education Program at the May 28, 2004 PPT meeting included: Goal 1 – The Student will demonstrate improved academic achievement with passing grades in all subjects;¹ Goal 2 – The Student will develop the organizational skills necessary for school success;² Goal 3 – The Student will demonstrate improvement in written language organization;³ Goal 4 – The Student will demonstrate improvement in algebra and math problem solving skills;⁴ Goal 5 – The Student will effectively

¹ Objective 1: The Student will use SERT time to work on assigned class work and homework seeking help as needed; Objective 2: The Student will complete daily class work and homework; Objective 3: The Student will plan and complete long term assignments, given a structure and deadlines for specific parts of the assignment.

² Objective 1: The Student will come to class with required course materials, on time; Objective 2: The Student will maintain a notebook with separate sections for each subject filing and saving handouts; Objective 3: The Student will use agenda book to record assignments and due dates, and check them off as they are completed.

³ Objective 1: The Student will use graphic organizers and other tools to plan and organize writing piece to teacher satisfaction in 3 or 4 trials; Objective 2: The Student will use organizers to complete writing pieces to fulfill stated requirement in 3 or 4 trials; Objective 3: The Student will utilize learned revision strategies to complete final draft by stated deadline in 3 or 4 trials.

⁴ Objective 1: The Student will demonstrate average achievement in the basic algebra program based on tests, quizzes, homework and class work; Objective 2: Given a word problem, The Student will highlight or underline the essential information in the problem, and in the question asked; Objective 3: The Student will identify appropriate problem solving steps orally or in writing, and solve the problems mathematically, with at least 75 percent accuracy.

- manage social skill utilization within the school setting;⁵ Goal 6: The Student will begin career exploration. ⁶[Exhibit B-52]
23. The goals and objectives for the 2004-2005 school year were drafted prior to the receipt of the reports from the psychologist and psychiatrist from the Institute of Living.
24. In the psychological evaluation conducted by the Institute of Living psychologist, the Student was described as a bright, thoughtful and articulate young man who currently appears to be struggling with anxiety. The psychologist also noted evidence of some depressive affect and feelings of low self esteem. It was noted that the Student processes information in such a manner that he is unable to integrate his experience fully, often missing the subtle nuances of situations. That fact, according to the psychologist, might leave him at risk for misinterpreting situations and the actions of others. The data suggested mild impairment in reality testing in ambiguous and emotionally charged situations; in these contexts, the Student's thinking might become confused. The psychologist noted that although the Student carries a diagnosis of ADHD, predominately inattentive type, the results of this testing were equivocal. [Exhibit B-55]
25. The psychologist explained that the Student does struggle with disorganization, forgetfulness and distractibility, which significantly impacts his ability to complete academic assignments. These symptoms, as well the Student's failure to complete schoolwork and chores, avoidance or reluctance to engage in homework and his difficulty sustaining attention to tasks are all symptoms of ADHD, predominately inattentive type. The psychologist noted, however, that the Student's difficulties in these areas might be better explained by a learning disability profile. Evidence from projective measures indicate that the Student has difficulty remembering and organizing visual material, and the Student has difficulty synthesizing part of his experience into a whole experience. Results of three previous cognitive testing have revealed that the Student's verbal reasoning skills have ranged from high average to superior, while his nonverbal reasoning skills are in the average range. The psychologist stated that this discrepancy between his scores in these domains of intellectual functioning is statistically significant and is suggestive of a nonverbal learning disability. [Exhibit B-55]
26. The psychologist strongly recommended a neuropsychological evaluation for diagnostic clarification, both for ADHD, predominately inattentive type and a nonverbal learning disability. The psychologist also highly recommended that the Student continue in a highly structured intensive educational setting with a low

⁵ Objective 1: The Student will identify specific instances in which his approach to peers has been ineffective or has resulted in negative outcomes by his judgment; Objective 2: The Student will role play successful approaches to actual situations he has experienced; Objective 3: The Student will implement effective social skills in his encounters with peers at school.

⁶ Objective 1: The Student will complete a career interest inventory; Objective 2: The Student will complete a computer search, matching interests and careers.

- student to teacher ratio that will be able to meet his learning needs and his clinical needs. The psychologist also highly recommended that the Student continue individual therapy. [Exhibit B-55] This psychological evaluation was thorough, and credible. It reflects the Student's functioning while at Webb School, consistent with testimony presented at the hearing.
27. Dr. Robert Sahl completed a formal psychiatric evaluation of the Student in June 2004. Dr. Sahl summarized his assessment indicating that the Student presents with a history of behaviors compatible with the diagnosis of Attention Deficit-Hyperactivity Disorder. He noted that there is some evidence that the Student is attempting to cope with significant issues regarding depression, anxiety and low self-esteem. Dr. Sahl further noted that there are indications of a nonverbal learning disability. The DSM-IV diagnoses included: Axis I – attention deficit-hyperactivity disorder, predominately inattentive type; rule-out dysthymic disorder; Axis II: Developmental coordination disorder, rule-out learning disorder, NOS. It was also noted that the Student had moderate-severe psychosocial stressors. [Exhibit B-56]
 28. Dr. Sahl recommended a highly structured and supervised, small educational environment with therapeutic intervention. Dr. Sahl further recommended medication trials for ADHD, and individual therapy. Dr. Sahl concurred with the psychological evaluation, noting that in order to precisely determine the presence of a non-verbal learning disability, neuropsychological testing should be performed. [Exhibit B-56] This was also a thorough evaluation, which accurately reflects the concerns and needs of the Student.
 29. The Parent requested that the Board convene a PPT to discuss the placement and program for the Student for the 2004-2005 school year on August 20, 2004. In her request she noted that given the results of the evaluations from the Institute of Living, and his overall daily needs, she was requesting placement at Marvelwood School in Kent. [Exhibit B-60]
 30. The PPT convened on September 7, 2004. The members of the PPT agreed to a neuropsychological evaluation. The Board members of the PPT recommended referral to the Board's STRIVE program, and denied the Parent's request for placement at Marvelwood. [Exhibit B-62] The STRIVE program was a Board self-contained program that deals with behavioral, emotional and psychiatric needs of the students. [Testimony Dr. Ratchford]
 31. The Parent enrolled the Student in Marvelwood, which enrollment was not successful for the Student. [Testimony Mother] On March 28, the Parent sent a request that a PPT be convened to discuss a homebound tutorial for the Student for the remainder of the year, as the Student was unable to complete the school year at Marvelwood. [Exhibit B-68]

32. Marvelwood School sent a correspondence to the Parent on April 13, 2005, confirming in writing that the Student was not invited back for the spring trimester. The Student was dismissed for failure to meet the attendance policy, failure to meet academic standards, and his inability to sustain the effort necessary to handle the school's curriculum. In the correspondence, the director of studies noted that Marvelwood did not have the appropriate support programs or resources necessary to accommodate the Student, and that he doubted that a public high school would have the support programs or resources necessary to accommodate him. [Exhibit B-70]
33. The Parent did not pursue a request for the Board to pay for the Marvelwood placement, as she felt it was the family's responsibility to pay for it. [Testimony Mother]
34. The PPT convened on May 10, 2005, and recommended a one to one tutorial of 10 hours per week, and counseling once a week. The PPT was scheduled to reconvene on June 20, 2005, upon completion of the neuropsychological evaluation. [Exhibit B-51]
35. While on homebound tutoring the Student had two measurable goals. Goal 1 – The Student will develop tools for coping with his emotions within the school setting;⁷ Goal 2: The Student will demonstrate improvement in work/study skills.⁸ [Exhibit B-51]
36. The PPT reconvened on June 20, 2005. The purpose of the PPT meeting was to review the neuropsychological evaluation and plan for a program for the Student. As of the date of this PPT meeting, however, the report was not complete. The Parent requested a residential placement at Franklin Academy at this PPT, which request was rejected by the Board. The Board offered a program at Hall High School, the other of the two Board high schools. [Exhibit B-57] The Board did not address the issue of how to transition the Student back into the Board school in light of the Student's attendance issues throughout his recent academic history.
37. At the PPT meeting in June 20, 2005, Dr. Ratchford reported that he had a telephone conversation with Dr. Ciocca, and her preliminary findings were that the Student had ADHD. After this conversation, Dr. Ratchford had no further conversations with Dr. Ciocca. [Testimony Dr. Ratchford] At the time of Dr. Ratchford's conversation with Dr. Ciocca, Dr. Ciocca had not completed her evaluation. Dr. Ciocca conducted an additional testing session with the Student after this telephone conversation. [Testimony Dr. Ciocca, Exhibit P-7]

⁷ Objective 1: The Student will identify negative patterns of behavior which interfere with school performance; Objective 2: the Student will be able to articulate alternative approaches to dysfunctional behaviors.

⁸ Objective 1: The Student will attend classes on time, and with appropriate study materials at least 90 percent of the time; Objective 2: Upon completion of teacher/tutor explanation of assigned task, the Student will begin working within five minutes on 4/5 trials; Objective 3: the Student will use agenda book or palm to record assignments and due dates and check them off as they are completed.

38. The goals and objectives developed for the 2005-2006 school year were set forth in the IEP of June 20, 2005. These goals were essentially a reiteration of the Board's prior goals and objectives for the Student.⁹ [Exhibit B-57] Although the Student had specific weaknesses in math, the Board did not include a goal in this area. [Testimony Ms. Callahan] The IEP did not adequately address the Student's present educational performance.
39. Cristina Ciocca, Psy. D., completed the neuropsychological evaluation of the Student. Her evaluation report was received by the Board sometime in August 2005. Dr. Ciocca concluded that the Student's primary disability was nonverbal learning disability syndrome, in addition to his secondary disability of attention deficit hyperactivity disorder. Dr. Ciocca noted that the Student was in a "vicious cycle of failure" with inconsistent work completion, procrastination, avoidance and poor task persistence. Dr. Ciocca noted that the Student's refusal of school and interventions likely reflect an inherent disappointment in himself and a sense of helplessness in effecting change. [Exhibit P-7]
40. Along with a recommendation that the PPT consider changing the Student's primary disability to a nonverbal learning disability syndrome, Dr. Ciocca made recommendations for programming and placement for the Student. Dr. Ciocca concurred with the previous examiners that the Student required a highly specialized, structured, supportive, interactive and specialized educational program that affords greater direct supervision, intervention and organization to the Student. The evaluator noted that the programming must not only be specialized in nonverbal learning disability populations, but also contain a psychotherapeutic component to curtail the vicious cycle. Dr. Ciocca recommended a smaller environment in order to minimize confusion. The programming required a multidimensional and multifaceted teaching approach that addresses the subtle speech and language deficits in pragmatics and semantics related to the nonverbal learning disability, and also directly addresses his inattention, difficulties in concept formation and problem solving. Dr. Ciocca recommended use of technological devices, and an assistive technology evaluation. She recommended that the Student have a very specific and specialized behavioral management program to create a method of checks and balances with appropriate rewards and consequences to enhance motivation and task completion. The extensive recommendations also addressed the psychotherapeutic component of the program, which should be consistent and target issues of self esteem and social skills. In addition, Dr. Ciocca recommended that the Student receive support from staff in order to circumvent

⁹ Goal 1 was identical to the first goal in the Student's homebound tutoring program. Goal 2 was essentially a restatement of Goal 1 in the Student's 2004-2005 IEP. Goal 3 was a restatement of Goal 2 in the Student's 2004-2005 IEP; while Goal 4 was a restatement of Goal 3 in the Student's 2004-2005 IEP. Goal 5 was a restatement of Goal 4 in the Student's 2004-2005 IEP. Goal 6 is essentially a restatement of Goal 5 in the Student's 2004-2005 IEP, however Objective 2 is a repetition of Objective 2 from Goal 5 of the 2005-2006 IEP. Goal 7 is a reiteration of Goal 6 in Student's 2004-2005 IEP.

- the Student's feeling of becoming overwhelmed. The recommendations included preferential seating, assistance with life skills, vocational exploration and tracking of progress. [Exhibit P-7]
41. Dr. Ciocca's report was thorough, conducted over four days in May, June and July 2005. Based on this report, Dr. Ciocca felt that the Student's educational and emotional needs were absolutely interconnected, and that a small highly structured environment was critical for the Student. Dr. Ciocca noted that her recommendations for the Student would have been different if the Student did not have a nonverbal learning disability, but was diagnosed solely with ADHD. She further noted that his disability was extremely disabling, and would impact him significantly across the board. Dr. Ciocca was confident in her diagnosis of the Student, and noted that oftentimes students with nonverbal learning disability are diagnosed as having ADD/ADHD. [Testimony Dr. Ciocca]
 42. The PPT reconvened on August 24, 2005. The Parent was not present at this PPT meeting, and the Board did not take sufficient steps to either reschedule so that the Parent could attend, or contact the Parent when she was not present at the PPT meeting. The Board claimed reason for proceeding with the PPT meeting on that date, to wit, that it was necessary to do so to ensure that a program was in place prior to the commencement of the school year, is not credible as no changes were made in the Student's IEP drafted in June 2005 at this PPT meeting. [Exhibit B-87]
 43. At the PPT meeting, the school based members reiterated that the Board was offering a placement at Hall High School for the Student. The goals were not revised after receipt of Dr. Ciocca's evaluation. While the Board members of the PPT disagreed with Dr. Ciocca's conclusion that the Student had a nonverbal learning disability, no Board staff contacted Dr. Ciocca to discuss this further, or invite her to a PPT meeting. Dr. Ciocca's conclusion regarding the diagnosis is credible, based on her thorough multiple day evaluation of the Student, and reflects the impressions and concerns of prior evaluators. [Exhibit B-87] Moreover, the school psychologist testified that Dr. Ciocca had more contact and information about the Student than he did. [Testimony Dr. Ratchford]
 44. The Parent placed the Student at Franklin Academy for the 2005-2006 school year. Franklin has a small structured environment, with a core group structure that assists the Student. The program is very structured with very little free time, and includes a social skills component. [Testimony Mother]
 45. Franklin Academy is not a state approved special education school. It is an independent private school that provides education to students with a nonverbal learning disability. The program at Franklin meets Dr. Ciocca's recommendations. The students are residential or day students based on parental preference. [Testimony Ms. Hays]

DISCUSSION/CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA of 2004], and its predecessor the Individuals with Disabilities Education Act [IDEA] provide for services to children with disabilities, from birth through age 21. It is undisputed that the Student is eligible for special education and related services.

While this request for hearing was filed after the effective date of the IDEA of 2004, this hearing relates to actions that occurred primarily under the IDEA, before IDEA of 2004 was effective on July 1.

I. Burden of Proof

The Supreme Court recently addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. ____, No. 04-698 (U.S. 2005). In *Schaffer*, the Court noted that states have responsibility generally for establishing fair hearing procedures. The plain text of IDEA is silent in the allocation of the burden of persuasion, as was the Maryland state law. Under those circumstances the Court found that the burden of persuasion/burden of proof falls upon the party seeking the relief. The Court declined to decide the issue of the burden of proof when states have their own laws or regulations which place the burden on the school district.

In Connecticut, the regulations expressly state that the Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall

be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 In a careful reading of the Court's decision in *Schaffer*, it is found that the Board continues to have the burden of proof in this state as is specifically stated in the regulations. The Board has not met its burden in this case.

II. Free Appropriate Public Education

The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

While there may have been procedural inadequacies in prior years, this decision solely addresses the program for the 2005-2006 school year, as the issues presented for determination in this hearing are solely addressing the proposed program for this school year.

Procedural flaws do not automatically require a finding of a denial of a free appropriate public education [FAPE]. Procedural inadequacies resulting in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in formulating the Individualized Education Program [IEP], clearly result in a denial of FAPE. *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072, 38 IDELR 91 (9th Cir. 2003), citing *W.G. v. Board of Trustees of Target Range School*

District No. 23, 960 F. 2d 1479, 18 IDELR 1019 (9th Cir. 1992), *accord*, *W.A. v. Pascarella*, 153 F. Supp. 2d 144, 35 IDELR 91 (D. Conn 2001)

Congress, in the 1997 reauthorization of the IDEA, heavily stressed the importance of parental participation in the decisional process.¹⁰ The importance of such parental participation was reiterated in the IDEA of 2004, wherein Congress noted, that “[a]most 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home. Sec. 601 It is clear that the parents’ right to participate is an essential aspect of IDEA, and that in this case, in the PPT meeting in August 2005, the Parents’ ability to contribute in the development of an appropriate IEP for the Student was denied by the Board. The Board also failed to include a regular education teacher at the August 2005 PPT meeting, although one was invited to attend.

The Board director testified that shortly after this August PPT meeting occurred, the resolution meeting required under IDEA of 2004 was held. [Testimony Mr. McGrath] The resolution meeting, however, does not supplant PPT meetings, nor does it replace the requirement that the Board must include the Parent’s participation in the PPT meeting. The Board violated the procedural requirement of parental participation in this PPT

¹⁰ See, for example, 20 U.S.C. §1400(c)(5)(B) (research and experience have demonstrated that educating children with disabilities is made more effective by "strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate..."); 20 U.S.C. §1414(d)(1)(B)(i) (parents shall be members of the IEP Team); 20 U.S.C. §1414(f) (Board shall ensure that parents "are members of any group that makes decisions on the educational placement of their child.").

meeting, a meeting in which the comprehensive neuropsychological evaluation was to be reviewed.

These procedural inadequacies of the August 2005 PPT did not rise to the level of a loss of educational opportunity to the Student and nor did it seriously infringe on the Parent's opportunity to participate in formulating the IEP. This PPT meeting was held after the Parent had filed this request for hearing, and the procedural violations occurred subsequent to the filing of the hearing request. While the Board erred in this procedural inadequacy, it was not an egregious violation or a serious infringement on the Parent's rights.¹¹ The procedural violations, while present, did not deny the Student a free appropriate public education. Rather, the Board failed under the second prong of *Rowley*.

In determining whether the second prong of *Rowley* met, the requirement of a free appropriate public education is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. *Board of Education v. Rowley*, 458 U.S. at 203

The IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Hendrick Hudson v. Rowley* 458 U.S. at 204
When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important

¹¹ The record does not reflect that there was a pattern of procedural violations, or that the Parent's rights to participate were seriously infringed by these actions. The Parent, by this time, had already filed this request for due process and was represented by counsel. The Board, however, should review its procedures to ensure that parents are appropriately notified of PPT meetings, and are contacted by appropriate and reasonable means if they are not present for a PPT meeting.

factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.*

This standard, however, contemplates more than mere trivial advancement. *Id.*

In determining whether the IEP was reasonably calculated to confer educational benefits, it must be determined whether the IEP states (1) the child's present level of educational performance; (2) the annual goals for the child, including short-term instructional objectives; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *M.S. v. Yonkers*, 231 F. 3d 96 (2nd Cir. 2000), citing *Walczak v. Florida Union Free School*, 142 F. 3d 119, 122.

The Student has been barely treading water academically. When he did attend the Board high school, with a program which consisted of many of the same goals and objectives proposed for the 2005-2006 school year, he made absolutely no progress. Thus, it is inconceivable that the goals and objectives would be appropriate for the Student.

The Board's proposed IEP for the 2005-2006 school year was not appropriate. It was not reasonably calculated to enable the Student to obtain education benefit. It was not drafted based on the Student's individual needs. Rather, the Board merely restated the previous goals for the Student who has been in this vicious cycle of unsuccessful placements, including at the Board high school. The IEP failed to accurately describe the

Student's needs and the extent of his disability, and failed to program for the Student's needs.

The Student's alienation, motivation and attendance have been issues that have significantly interfered with the Student's educational performance. But, even in light of this, the Board did not propose a functional behavioral assessment, any specific behavioral goals or objectives, or a behavioral plan to target these concerns. Despite the severe school avoidance issues, the Board never proposed a plan to transition the Student back into the Board schools, merely speculating that a switch to the other Board high school might be a fit. The Board members of the PPT did not recommend an assistive technology evaluation, although the Student has consistently attempted, albeit for the most part unsuccessfully, to use his own assistive technology to organize himself and for note-taking. The Board rejected the conclusion of the neuropsychological evaluation, which concluded what other appropriate evaluators had suspected, that the Student had a nonverbal learning disability, and his program must address his critical needs, needs which differed from those who are diagnosed solely with ADD/ADHD. The Student's high school experience has been a repeated history of unfortunate failures to engage in the educational process, school avoidance and missed opportunities. The Board's proposed program does not reflect nor does it address the Student's critical concerns and needs. The IEP for the 2005-2006 did not offer the Student a free appropriate public education.

When it is determined that the board's program is inappropriate, the parent is entitled to reimbursement if the parent's private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The Board has

asserted that the Parent's proposed placement is too restrictive. As to the restrictive nature of Franklin Academy, parents seeking an alternative placement are not subject to the same mainstreaming requirements as a school board. *M.S. ex rel S.S. v. Board of Education of the City of Yonkers*, 33 IDELR 183 (2nd Cir. 2000), citing *Warren G. v. Cumberland County School District*, 190 F. 3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect) Under the appropriate standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), citing *Florence County School District Four v. Carter*, 501 U.S. 7 (1993) Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education. *Id.* The Student would not receive an appropriate education in the program proposed by the Board.

The issue remains as to whether the Parent's placement of the Student is appropriate. The Parent has attempted to place the Student in an appropriate setting over the last few years, with no success. In light of Dr. Ciocca's neuropsychological evaluation, the Parent determined that the Franklin Academy program met the needs of the Student. The testimony of the educational director testified that Franklin Academy provides a highly structured program addressed specifically to the needs of the nonverbal learning disabled student. In light of Dr. Ciocca's convincing testimony that the Student requires such a highly specialized, structured, supportive, interactive and specialized educational program that affords greater direct supervision, intervention and organization to the Student, and specialized in nonverbal learning disability populations, Franklin Academy

meets the Student's needs, and is appropriate. Furthermore, Franklin is appropriate since it does focus on the nonverbal learning disabled needs of the Student, a program that requires a multidimensional and multifaceted teaching approach that addresses the subtle speech and language deficits in pragmatics and semantics related to the nonverbal learning disability, and also directly addresses his inattention, difficulties in concept formation and problem solving, as was recommended by Dr. Ciocca.

Franklin Academy is admittedly not a special education school that is approved by the State Department of Education. Furthermore, it does not appear that the Student is obtaining counseling services from the staff at Franklin, according to the testimony by the Franklin's educational director. Nevertheless, the Parent has proven that this restrictive, non-mainstream environment is required to provide the Student with an appropriate education.

The Parent's placement of the Student at for the 2005-2006 school year, while not perfect, is appropriate. Nevertheless, nothing in the record supports a finding that the Student requires the residential portion of the placement to benefit from his education at Franklin Academy. As was testified by the Franklin Academy education director, the determination of whether a Student is a day student or a residential student is merely based on parental preference. No evidence was presented to support any finding that the location of Franklin Academy in East Haddam, Connecticut, was too distant from West Hartford, Connecticut, for the Student to attend as a day student. The Board is not required to pay the residential component of the placement at Franklin Academy.

FINAL DECISION AND ORDER:

1. The Board did not offer an appropriate program for the Student for the 2005-2006 year.
2. The program and placement at Franklin Academy is an appropriate program to meet the Student's educational needs for the 2005-2006 school year.
3. The Board is financially responsible for the educational costs for the program and placement of the Student for the 2005-2006 school year.
4. The Board is not responsible for the residential component of the placement at Franklin Academy.