STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Groton Board of Education

Appearing on behalf of the Student:	Parent, Pro Se
Appearing on behalf of the Board of Education:	Attorney Marsha Belman Moses Berchem, Moses & Devlin, P.C. 75 Broad Street Milford, CT 06460
Appearing before:	Attorney Christine B. Spak Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board failed to provide a free, appropriate public education (FAPE).
2. Whether the Board failed to educate by properly constructing and implementing IEP, meeting goals and objectives according to the Student's academic needs.
3. Whether the Board failed to place the Student in a suitable placement.
4. Whether the Board was incorrect in finding that an October 20, 2005 incident was not a manifestation of the Student's disability or a serious emotional disturbance.

SUMMARY:

The Student was fifteen years old at the time of hearing in 2006 and had entered the Board's schools from out of state in 2002. When he entered the Groton schools he had already been identified as a student with a learning disability. There have been three due process requests filed by the Parent between June 2005 and January 2006, two of them resulting in fully litigated due process hearings. In the instant matter the Parent's main concern, based on her actions and evidence, appears to be the Student's difficulty reading. It is agreed by the parties that the Student is a generally well behaved boy, well liked by peers and teachers. However, in September and October 2005 he committed two acts, the first involving fireworks he gave to a friend who set them off in school which led to the discovery of a gun facsimile on the Student at school and the second involving a pipe bomb set off by an acquaintance in the Student's neighborhood with the Student watching, that resulted in suspensions and the recommendation that Student be placed in an alternative forty five day placement. The mother did not send him to the alternative

placement and on the first day of hearing the hearing officer learned that the Student had been getting no educational services since October 2005. The Hearing Officer ordered ten hours of home tutoring to begin at a neutral site immediately. The Board made it clear they were supportive of the order. The Parent, consistent with her conduct throughout the hearing, expressed many concerns and reservations. The Hearing Officer made it clear that it was her expectation that while the tutoring might not be perfect in all regards at all moments, providing educational programming to the Student was of paramount importance and the tutoring would begin immediately and would not be interfered with or discouraged by anyone. Throughout the hearing the tutoring occurred and it was reported to still be occurring in the post hearing brief filed by the Board.

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

FINDINGS OF FACT:

1. **Procedural History:** This is a procedurally and factually complex case, further complicated by the conduct of the Parent, as is set down in more detail below. There had been a fully litigated due process hearing which began in the fall of the 2005-2006 school year as well as a due process request filed in June of 2005 that had resulted in a dismissal. The first case had placed FAPE in issue but the parties agreed that the second case which was the fully litigated case, did not directly place FAPE in issue at the outset. The instant request for due process was received on January 30, 2006 and did place FAPE in issue at the outset. From the beginning even pinning down the issues was complicated by lack of cooperation by the Parent. The Parent had retained and paid a substantial amount of money (in excess of ten thousand dollars) to two attorneys in her prior matters but was unrepresented throughout the instant hearing. She came to the instant hearing under the strongly held misunderstanding that the Student had to be labeled emotionally disturbed in order for an IEP team to determine his misconduct was a manifestation of his disability. This hearing had been commenced by a Request for Impartial Special Education Hearing dated January 27, 2006 signed by the Parent on behalf of the Student setting forth the following issues ("the Initial Due Process Request"):

> "1. Parent asserts that the District has failed to provide a free appropriate education;
> 2. Failed to conclude that The Student's misconduct for which he is subject to discipline was a manifestation of his disability, and or
> 3. Failed to conclude that The Student has a serious emotional disability.
> 4. Failed to educate, evaluate, identify and protect school years 2004-2006 [sic]"

The prehearing conference was conducted on February 7, 2006. Both parties participated. The prehearing was unusual in the amount of confusion surrounding the issues and what the Parent was really wanting for her son and why. For instance, as part of the remedy she was seeking, she asked for a placement in at Waterford Country Day School but did not have a response to the query as to what she wanted if Waterford Country Day School declined to accept the Student for lack of an opening or other reason. The Board objected that as framed, the Parent's due process request included issues already decided by a previous hearing officer, and/or provided insufficient specificity for the purpose of allowing the Board to respond

It was agreed, and the Hearing Officer directed, that the Parent would clarify her issues, particularly the time period(s) intended to be covered by her issues and fax them by February 11, 2006 and the Board would respond by February 18, 2006, identifying issues that they thought had been addressed in the prior hearing earlier this same school year before a different hearing officer. The parties agreed to the dates for hearing which would go well beyond the statutory timelines. Hearing dates were scheduled for March 2, 6, 13, and 30. This was to accommodate the parties' schedules and need for time to prepare their cases and there was no objection from either side to the dates or to an extension of the date for mailing of the final decision to accommodate these needs of the parties.

By Request for Impartial Special Education Hearing dated February 10, 2005 and purportedly in response to the February 7, 2006 pre-hearing conference, the Parent submitted another Initial Due Process Request and stated the issues as follows ("the Revised Due Process Request"):

1. Groton Schools failed to provide a free, appropriate public education.
2. Failed to educate by properly constructing and implementing IEP, meeting goals and objectives according to student's academic needs [sic].
3. Failed to place [the Student] in a suitable placement.
4. Failed to conclude [the Student's] misconduct was a manifestation of his disability or a serious emotional disturbance.
5. Failed to identify and evaluate specific learning disability.
6. Failed to protect against sexual harassment from another student.

The relief sought by the Parent under the Revised Due Process request was to "properly place [the Student] in Waterford Country Day School as medically recommended"; "conclude that [the Student's] misconduct was a manifestation of [the Student's] disability or that [the Student] has a serious emotional disability"; "properly protect, identify, evaluate, educate by constructing suitable IEP, meeting goals and objectives"; and "past and present attorneys' fees and expenses totaling $13,539.00".

On February 17, 2006, the Board filed a Motion to Dismiss on the grounds that the Parent's statement of issues failed to comply with the provisions of 20 U.S.C. §1415 (b)(7)(A), that the Board was unable to respond to the Revised Due Process Request or prepare for the hearing due to such non-compliance; and that the Hearing Officer lacked jurisdiction over at least some of the issues and requests for relief requested by the Parent. The Hearing Officer denied the Board's Motion to Dismiss by notice dated March 2, 2006. By letter to the Hearing Officer dated March 6, 2006, the Board stated its

sufficiency challenge to the Revised Due Process Request. By Order dated March 8, 2006, the Hearing Officer ordered the Parent to identify in writing by no later than 3:00 P.M. on March 10, 2006 the dates or date ranges of the issues being submitted to the hearing. The Order further stated that failure to comply with the order "may result in dismissal of the due process action".

By letter to the Hearing Officer dated March 9, 2006, Board counsel notified the Hearing Officer that she had received the Parent's exhibits which consisted of the Board's exhibits from the prior hearing not relabeled as parent exhibits, and various other documents which were not labeled or paginated as required by the State Department of Education. The Board initially had not submitted any exhibits on the basis that the issues had not been properly identified and therefore appropriate documents for submission as exhibits could not be determined; however, in an effort to facilitate the hearing, the Board submitted exhibits by letter dated March 9, 2006, with full reservation of rights.

By letter dated March 10, 2006, the Parent responded to the Hearing Officer's March 8 Order by stating that she was aware of the two year statute of limitation, she was not familiar with when that statute of limitations began to run, and that she was making claims from October of 2002 through January of 2006. She also objected to the Board exhibits based on the five day rule.

Upon request by the Board, and in the absence of any objection from the Parent, the hearing scheduled for March 2, 2006 was cancelled due to the fact that the Board's Director of Pupil Services was having surgery that day. By letter dated February 28, 2006, the Parent requested that the March 6, 2006 hearing date be cancelled because she would not be "completely prepared to present [her] case". The Hearing Officer granted this request in the absence of objection by the Board.

The Hearing commenced on March 13, 2006 and extensive discussion occurred regarding the issues being submitted to the hearing and the time period to be covered by those issues. The Hearing Officer ruled that (1) issue 5 of the Revised Due Process request was dismissed as moot since the Student was identified as having a specific learning disability; (2) issue 6 was dismissed regarding the claim that the Student had been sexually harassed by a female student, (3) she could not provide the Parent the relief being sought in the form of attorney's fees and costs, (4) that the issue regarding the manifestation determination related to the misconduct of making a bomb off school grounds; and (5) that as to the issues of whether Groton had provided a free appropriate education for the Student, had developed an appropriate IEP, and had made a "suitable placement for The Student", those issues would cover the time from November 2, 2005 forward.

In the course of the discussions during the first day of hearing, the Hearing Officer became aware that the Student was not receiving any educational services. She asked whether the Board was willing to provide homebound services on an interim basis and the Board immediately indicated its willingness to do so. Initially, the Parent did not agree and then indicated that she would only agree if she could accompany the Student to the tutoring sessions. The Hearing Officer entered an order that the Student would receive one on one tutoring at a neutral location, such as the Groton Public Library, for ten hours per week; that the tutoring would be in academic subjects; and that the Parent was not permitted to attend the tutoring sessions. The tutoring was provided to the Student, and continued throughout the time period covered by the hearing. It was

reported in the Board's post hearing brief that the tutoring was continuing through that point. The Board offered to provide, and has provided, regular progress reports regarding the tutoring. (B-61). Throughout the hearing, the Parent had lodged with the Hearing Officer various complaints about the tutoring, which complaints the Hearing Officer directed the Parent to address with Dr. Jacaruso, the Director. The Parent did violate the Hearing Officer's order by stopping in during the tutoring at the library on one day. (B-61, p.15).

Throughout the hearing, references were made to multiple settlement attempts, including a lengthy mediation, all of which were ultimately unsuccessful. At the hearing on March 13, 2006, the Board addressed the Parent's request for relief that the Hearing Officer place the Student at Waterford Country Day School. The Board represented that it had contacted Waterford Country Day School and there were no spaces available for the Student. The Hearing Officer indicated that if the Parent was seeking placement at Waterford Country Day, she would need to provide evidence that there in fact was availability there. At no time did she present such evidence.

The order for the tutoring forwarded by the Hearing Officer was one apparently welcomed by the Board since all prior efforts to obtain some type of education for the Student had failed and as of the first day of hearing, the Parent's sole request was for placement at Waterford Country Day School, where no opening was available. By Notice dated March 20, 2006, the Hearing Officer scheduled the following hearing dates: March 22, 30, 31, April 11, 18, 19, 20, 21, and May 1 and 3, 2006.

The hearing reconvened on March 22, 2006. At this hearing, the Parent stated that she was waiting for an evaluation that had been completed on February 16, 2006. At the end of that hearing date, the Hearing Officer order the Parent to (1) properly submit her exhibits; (2) provide a copy of the outside evaluation by March 24, 2006 to Board counsel and the Hearing Officer and (3) by March 24, 2006, provide the name of her expert witness and the date on which that individual would be available to testify. The Parent did provide the evaluation within the ordered time limit, but failed to provide the information about the expert witness. The Parent responded by letter dated March 7, 2006 stating that her expert witness, Dr. Selden, would not be available until sometime after March 31, 2006.

The Board responded by letter dated March 29, 2006 to the Hearing Officer, again requesting that the matter be dismissed if the Parent was unable to proceed with the hearing on March 30, 2006. By letter dated March 29, 2006, the Parent notified the Hearing Officer and the Board that Dr. Selden was available on April 11, 2006.

The hearing convened on March 30, 2006. An inordinate amount of time was spent discussing the Parent's expert witness. In the course of this discussion, the Parent revealed that her expert, Dr. Selden, had never met the Student or the Parent and had, obviously, never conducted any evaluation of the Student. The Hearing Officer explained that this witness' testimony may not carry much weight and that it would be more productive to have the individual who performed the testing as a witness. Based on the Parent not being prepared to proceed, the hearing scheduled for March 31 was cancelled. The Hearing Officer also cancelled the hearings that were scheduled for April 18 and April 21. She directed the Parent to notify her and the Board's counsel by April 4, 2006, as to whether a witness who conducted the evaluation or Dr. Selden would be testifying on April 11 and if so, to identify the witness, and stated that in the absence of

such notice by April 4, 2006, the April 11, 2006 hearing date would be cancelled. The Hearing Officer further directed the Parent that by no later than April 12, 2006, she was to notify both the Hearing Officer and Board counsel as to the identity of the expert witness and the date of that witness' availability; if she did so, then all hearing dates scheduled before the date of noticed availability would be cancelled. In the event that the Parent failed to provide the notice by April 12, 2006, it would be deemed that the Parent rested her case and the Board would be prepared to commence her case on April 26, 2006.

The Parent failed to comply with this order from the Hearing Officer. She failed to provide any notice by April 4, 2006. Therefore, consistent with that which had been stated at the March 30 hearing, the Hearing Officer issued a Notice dated April 5, 2006 canceling the April 11, 2006 hearing. Hearing dates of April 26, 27, May 1, 3, 8, 10, and 19 were confirmed. The Hearing Officer also requested that the Parent notify her by fax "as soon as she knows who her next witness will be and when her next witness will be available".

The Board objected to this Notice by letter dated April 6, 2006 for reason that the Board thought it was inconsistent with the Hearing Officer's directives on March 20, 2006, requiring the Parent to provide notice by April 12, and the Board believed it appeared to allow the Parent an unlimited amount of time to produce a witness. The Parent responded by letter dated April 6, 2006, with no further information as to the availability of any expert witness.

The Hearing Officer issued a Notice dated April 7, 2006, confirming the cancellation of the April 11 hearing date due to the Parent's failure to provide notice by April 4. She further confirmed that the Parent must notify her and the Board by April 12 "who will be testifying on April 26 and who will be testifying on April 27". On April 12, 2006, the Parent notified the Hearing Officer and the Board that Dr. Palav would testify on April 12, 2006 and that she would check whether Dr. Selden was also available to testify on that date.

At the March 30, 2006 hearing, the Parent complained to the Hearing Officer regarding the fact that the Student had not been admitted to Ella T. Grasso Technical High School (Grasso Tech) and blamed this rejection on the Board's failure to submit the Student's transcripts. The Hearing Officer inquired of the Parent as to how she knew that the Student had not been accepted and she indicated that she was told by a secretary. The Hearing Officer requested that both parties submit to her information as to the status of the Student's application to Grasso Tech. Based on the instructions of the Hearing Officer, Dr. Jacaruso, the Board's Director of Pupil Personnel Services, contacted Grasso Tech, the principal of the high school and the Student's middle school guidance counselor who had subsequently moved out of state. By letter dated April 7, 2006, the Board submitted to the Hearing Officer a letter from Dr. Jacaruso and from Grasso Tech indicating that Grasso Tech never received an application for the Student for the 2005-2006 school year. The Parent's response of April 10, 2006 was to request that the Hearing Officer order that the Board provide the Student's transcript to Grasso Tech. By letter dated April 10, 2006, the Board submitted a further letter to the Hearing Officer with emailed information from the Student's middle school guidance counselor stating that the Student never submitted the completed application, stating that "he would rather play football at Fitch Sr. High School"; she further reported that the Parent had told her

that she (the Parent) would "take care of the application process and deal with Grasso staff directly". At no time did the Parent provide any evidence of any application she made to Grasso Tech nor any follow up she had made. Her only response was that the Board should be ordered to provide a transcript and apparently took no follow up action of her own.

The hearing reconvened on, April 26, 2006 at which time, without rational basis, the Parent complained that the April 11, 2006 date had been cancelled. Dr. Palav testified on April 26, 2006 and the Parent rested her case. The hearing ended at approximately 6:00 P.M., with the next hearing date scheduled for the following day at 8:00 A.M.

The Hearing Officer, the Board's counsel and Dr. Jacaruso were present at 8:00 A.M. on April 27, 2006. When the Parent had not appeared by 8:20 A.M., the Hearing Officer requested that Dr. Jacaruso check to see whether the Parent had left any message. Dr. Jacaruso returned with a message that the Parent had left on her answering machine stating that the Parent had an appointment and would be approximately 45 minutes late. The Hearing Officer gave the Board the option of waiting for the Parent or canceling the hearing because if the Parent had in fact had an early morning "appointment", she would have known it by close of business the night before and she had said nothing to the Hearing Officer or Board. The Board requested the hearing be dismissed with prejudice; this was denied. Since it was unclear when the Parent was going to appear, the Board decided that the hearing should not proceed on that date. As the Board and Hearing Officer were leaving, the Parent appeared and reported that she was tired because she had been up late the night before preparing the Parent exhibits; however, the proper Parent's exhibits were never submitted.

The hearing then continued on May 1, 2006. The Hearing Officer reported what had occurred at the April 27, 2006 hearing. The Parent denied leaving a message that she had an appointment. The Board commenced its presentation of its case, which continued on May 8 and May 19. The Board rested its case at that time and the Parent presented some additional testimony on the last day in rebuttal.

Board exhibits B-1 through B-63 were admitted in the course of the hearing. Parent exhibits P-1 through P-20 were admitted. The Parent's exhibits were never properly submitted. After post hearing briefs the date for mailing of the final decision in this matter was set for July 7, 2006.

2. The Student was born on February 22, 1990 and was 15 years old at the commencement of this hearing.

3. He is a well-behaved student, well-liked by peers and teachers. As the Board states in their brief, "All teachers reported that the Student was cooperative, polite and appropriate behaviorally." Board's brief at proposed Finding of Fact 22. "None of the teachers had reported any problems, nor had there been any disciplinary issues involving the Student and other than that of September 29, he had complied with all school rules." Board's brief at proposed Finding of Fact 23.
4. When he entered the Groton schools from Dover, New Hamshire public schools he had already been identified as a student with a learning disability.

Subsequent to his enrollment at Fitch Middle School ("FMS") in the Groton Public Schools, a PPT was convened, evaluations conducted and a determination was made that he continued to qualify as a student with a learning disability. IEP's were developed and implemented for the Student throughout his middle school career based upon his learning disability. (B-11 through B-24; testimony, Y. Jacaruso, B-50, p.2).[1]

5. In the spring of 2005, Dr. Jacaruso was notified by the principal at FMS that the Parent had removed the Student from school and was requesting homebound instruction and updated evaluations. The Parent had stated that she wanted the Student to attend Grasso Tech. This was Dr. Jacaruso's first involvement with this matter. (Testimony, Y. Jacaruso; testimony, Parent).
6. A PPT was convened on June 6, 2005 to address the Parent's concerns. This PPT was attended by counsel for the Parent; the Board was not represented. As of this time, the Student was not attending FMS as the Parent was by her own choice keeping him home from school. At that PPT, as an accommodation to the Parent and because she was concerned that the Parent was not sending the Student to school, Dr. Jacaruso offered both homebound tutoring and summer school programming for the Student. Although the Groton Public Schools had no control or input into the admission process at Grasso Tech, and again as an accommodation to the Parent, the PPT agreed to conduct the triennial evaluation on an expedited basis. (Testimony, Y. Jacaruso; B-26; B-27; testimony, Parent).
7. The PPT then planned the triennial evaluation. The Parent and her counsel participated in the PPT and the planning of the evaluation. The school team recommended cognitive, behavioral, achievement and processing testing to be performed. The Parent agreed to this testing. Neither the Parent nor her attorney raised any questions or issues about any emotional or behavioral issues that the Student was having, nor did they indicate any concerns about the possibility that the Student had any disability other than a learning disability. The school based team had determined at the prior PPT of May 24, 2005 that the Student's present levels of educational performance in the areas of social/emotional/behavioral were age and grade appropriate (B-24, p.3) and the Parent never raised any objections to or disagreement with such a determination. (B-24; testimony, Y. Jacaruso; testimony, Parent).
8. The only issue about anyone's behavior which the Parent raised at that time was her claim that a female student had sexually harassed her son. The Parent believed that there were no issues about the Student's behavior in this regard and the problem was the behavior of the other female student. (Testimony, Parent). At the June 6, 2005 PPT, the Parent indicated that she would notify Dr. Jacaruso or the FMS assistant principal by June 7, 2005 if she wished to pursue a sexual harassment complaint. She never gave any such notification. (B-27; testimony, Y. Jacaruso; testimony, Parent). The Parent persisted in complaining to the Board in January of 2006 about this female student, asking the Board to "make it a priority", despite the fact that the Student was not attending the Board's schools. (P-11, p.17), and the Parent initially submitted

her claim that the Student was being sexually harassed to the instant hearing. The Hearing Officer dismissed that claim.

9. The triennial evaluation was completed by Joyce Schmenk in June of 2005. Ms. Schmenk is a school psychologist with a Masters of Education in school psychology. She has worked for more than 20 years as a school psychologist in Ohio and then in Connecticut, working with special education students of all eligibility categories. She has conducted thousands of evaluations of students in her career. She regularly attends PPTs, participates in the development of IEPs, consults with teachers and provides interventions for students. She is certified by the State of Connecticut as a school psychologist. She had not worked with the Student prior to conducting the triennial evaluation for him. (Testimony, J. Schmenk).
10. When she was assigned to do the triennial, Ms. Schmenk contacted the Parent. One of the assessments which the PPT had agreed to be performed was the Behavioral Assessment for Children (BASC), a rating scale which, when completed by all participants (teacher, child and parent), provides an overall picture of the student's behaviors. Ms. Schmenk gave the BASC to the Student's teachers at FMS to complete and completed the Student's portion of it with the Student. She also spoke with the Parent about the need for her to complete this scale and provided it to her. When Ms. Schmenk did not receive it from the Parent, she contacted the Parent and requested it again. In fact, she asked for it three times, but the Parent never produced the BASC checklist for Ms. Schmenk, nor did she ever provide any explanation to Ms. Schmenk as to why she did not do so until the day of the August 5, 2005 PPT when the Parent stated to Ms. Schmenk, in response to her inquiry about the Parent's completion of the BASC, that the information being requested was not relevant to the evaluations. Therefore, Ms. Schmenk completed the assessment without the parent portion of the BASC, and relied upon the teacher and student rating scales. (Testimony, J. Schmenk; B-50, p.2; FOF2).
11. Ms. Schmenk wrote a 15 page Report of Re-evaluation dated June 30, 2005. She reviewed the Student's academic history, including his Parent's removal of the Student from school at the end of the 2004-2005 school year. Her testing concluded that in the cognitive area, the Student had an overall IQ in the upper end of low average. He demonstrated significant strength in the area of perceptual reasoning. His difficulties were in the area of processing speed and during the testing he demonstrated difficulty concentrating and sustaining attention, which was consistent with his test scores in these areas. On the achievement testing, he was below average in word reading, reading comprehension and spelling. He had made significant gains in numerical operation, math reasoning and written expression. He continued to demonstrate difficulty in sustaining attention, which specifically negatively impacted his reading comprehension. (B-28; testimony, J. Schmenk; B-50, p.2-3; FOF3&4).
12. The results of the teachers' and student BASC were also reviewed. On the teachers' BASC, the Student was in the clinically significant range in the area of Learning Problems, and was rated At Risk for Attention Problems and

Study Skills. None of the teachers rated the Student as having any problems presented in school in the social/emotional/behavioral areas. The Student's responses on the BASC resulted in his being in the Clinically Significant range for Sense of Inadequacy, Locus of Control, Depression and Relations with Parents; and in the At Risk range for Anxiety, Attention Problems and Self Esteem. Neither teachers, nor the Student himself, indicated concerns regarding hyperactivity. (B-28; testimony, J. Schmenk; B-50, p.3; FOF5-6). A PPT was convened on August 5, 2005 for the purpose of reviewing the evaluation. As of this date, the Parent had commenced her first Due Process Hearing ("the First Due Process hearing"), and mediation was scheduled to be held the following day. Board counsel was present at this PPT. The Parent, in her testimony, insisted that this PPT was a resolution meeting and that a court reporter was present. She persisted in this claim despite having previously requested from the State Department of Education a copy of the transcript of the August 21, 2005 PPT (there actually was no PPT held on that date) and then having been advised on December 29, 2005 by Tom Badway at the State Department of Education that the State Department of Education would not have sent a court reporter to a PPT and therefore, no transcript was available. (P-11, p. 8).

13. Ms. Schmenk discussed her test results; however, when she began to discuss the results of the BASC, the Parent began to cry and stated that she did not want the results of the BASC discussed. She was told that the PPT would continue, despite the fact that she was leaving the room. The Parent left the PPT. Mr. Schmenk discussed the BASC, and the Parent then returned to the PPT. (B-30; Testimony, Y. Jacaruso; testimony, J. Schmenk).
14. The August 5, 2005 PPT lasted for approximately four hours. Upon the completion of the review of the psycho-educational evaluation, the PPT developed an IEP for the Student. That IEP incorporated the recommendations by Ms. Schmenk. (B-30; testimony, J. Schmenk). The PPT focused on the Student's academic issues and at no time did any member of the PPT, including the Parent and the Student's grandparent who was also in attendance, ever raise or discuss any concerns about the Student's behaviors or emotional status. In fact, no such concerns, or basis for such concerns, ever existed. The Parent never requested any counseling services or any behavioral goals and objectives in the IEP. (B-30; testimony, J. Schmenk; testimony Y. Jacaruso; B-50, p.3; FOF7&8).
15. In fact, the Parent was pleased with the IEP and at the hearing testified that she was "happy with the outcome" of that PPT, and felt that it was a "terrific IEP for his academics" and that it was addressing his academic issues and fitted his needs. The Parent testified to this effect in the Second Due Process Hearing, albeit in the instant hearing she denied such testimony until presented with a copy of the transcript of her testimony, at which time she affirmed that testimony. (Testimony, Parent; B-50, p.3).
16. At the August 5, 2005 PPT, the Parent, who was an active participant in the PPT, at no time indicated any disagreement with the test results, raised any concerns about the sufficiency of the evaluation or whether there were other

areas to be evaluated or that she wanted any further testing. She did not raise any issues about the Student's behavior or emotional status and, in fact, refused to discuss even the results of the BASC. In Ms. Schmenk's professional opinion, she had conducted a thorough evaluation of the Student. There was no reason to suspect a serious emotional disturbance, or to conduct further evaluations in that area, since there were no indication by the teachers of any behavioral or emotional concerns on the BASC, the school records which she reviewed reflected no history of behavioral issues, and in working with the Student, Ms. Schmenk saw nothing to cause her to believe that he was a child who may qualify with an emotional disturbance. The only consistent "behavioral" issue reported by his middle school teachers was homework completion. (Testimony, J. Schmenk; testimony, Y. Jacaruso; B-28).

17. In addition to agreeing upon an IEP for the 2005-2006 school year, it was agreed at the August 5, 2005 PPT that a PPT would be convened on September 30, 2005 for the purpose of reviewing the Student's program. (B-28; testimony, Y. Jacaruso).
18. On June 2, 2005, the Parent, through her then attorney, had commenced the First Due Process Hearing. This hearing was assigned to a hearing officer other than the Hearing Officer in the instant case. Mediation was scheduled for August 8, 2006. The Parent failed to appear for that mediation, although representatives of the Board and the mediator from the State Department of Education did appear. A hearing was convened on August 9, 2006 and the Parent failed to appear at the hearing. The Board moved to dismiss the hearing, and the hearing was dismissed without prejudice through Final Decision and Order 05-145. (B-32).
19. The Student began attending Fitch High School ("FHS") at the beginning of the 2005-2006 school year, his ninth grade year. He came to football practice at FHS prior to the beginning of the year; however, the Parent stated she deliberately kept him out of school for the first two days of school, although school records show him in attendance. The Parent testified she kept him home because she was not clear where he was going to school and she did not know when school started. However, parents are sent notices regarding the start of school in August, 2005 and the Parent told Dr. Jacaruso she was sending the Student to FHS for the 2005-2006 school year and apparently the Student did participate in pre-season FHS football practice. (Testimony, Parent; testimony, Y. Jacaruso; testimony, P. Esposito; B-30, p.1; Rec. #4).
20. The Student transitioned well into the high school. He was performing well in his classes, although behind in handing in some of his homework. In accordance with the recommendation of the August 5, 2005 PPT, the Parent was contacted in late September to schedule a review PPT. (B-31, p.2; testimony, P. Esposito; testimony, A. Diskin).
21. The Student participated in freshman orientation and was also present on the first day of school. During these times, students are made aware of the school rules, including the rules of discipline. Students receive the FHS Student Handbook and the Suspension/Expulsion Policy, and both during freshman

orientation and on the first day of school, an administrator orally reviews the pertinent portions of the handbook, including the provisions regarding student conduct and discipline, with the students. On the first day of school, the Student received and signed for the FHS handbook and the Suspension/Expulsion Policy. (B-51; B-60; testimony, P. Esposito; B-50, p.3, FOF9).

22. On September 29, 2005, while on school grounds, the Student obtained fireworks from a student and passed them on to another student who then lit them in the math classroom. In the course of addressing the fireworks issue the Board found that the Student was also in possession of a facsimile gun on school grounds. The Student was suspended for ten days for this misconduct. Mr. Esposito, Assistant Principal at FHS, spoke to the Student at the time; the Student appeared remorseful and acknowledged that he had done something wrong. (B-33; B-50, p.4, FOF 12; testimony, P. Esposito).
23. A PPT notice was sent on September 30, 2005 with the stated purpose of conducting a manifestation determination on October 5, 2005. However, based on a conversation between the Parent and Mr. Esposito, it was agreed that the purpose of the PPT would be a program review in accordance with the PPT recommendation of August 5, 2005. (Testimony, P. Esposito; B-50, p.4; FOF14; B-34; B-35).
24. The October 5, 2005 PPT was attended by Mr. Esposito, the Mother, her husband, Ms. Green (the Student's history teacher), Mrs. Lunt (special education teacher) and Marguerite Mitchell (guidance counselor). The school team reported that the Student had made a good transition to FHS, was successful in some of his classes, but had missed a couple of assignments in other classes, which he could make up. Teacher reports were read. As of this date, the Student was receiving a B in English, 72 in Applied Math (due to missing assignments), and was failing History (again due to missing assignments which could be made up in resource room). It was reported that the Student was using resource effectively. The Student's IEP of August 5, 2005 was reviewed and all agreed that he was doing well on his IEP goals and objectives. All teachers reported that the Student was cooperative, polite and appropriate behaviorally. The Mother raised only two issues regarding the Student's program: (1) she wanted him placed in a higher math class, which was agreed to be done the following semester, and (2) she wanted him to get an assignment pad to write down his assignments, which was also agreed upon. The PPT also recommended that beginning in the second semester, in addition to IEP'd services, the Student would be in Academic Lab, which is a small classroom of approximately 10 students taught by a regular education teacher. The class is a 90 minute block class which meets every other day and which focuses specifically on reading and writing. Even though by this date the Student had been suspended for his actions of September 29, 2005, and other than the two issues cited above, the Parent raised no issues regarding the Student's IEP, indicated no disagreement with his program, raised no issues regarding this eligibility category, never raised or discussed any issues regarding any social emotional issues, expressed no concerns regarding how

the Student was doing in school, and requested no further services or change in his IEP. Mr. Esposito, who conducted the PPT, asked each staff member if they believed that the Student's program was appropriate and each responded in the affirmative. No one raised any concerns. The meeting concluded with an agreement by all parties, and a sense that the Parent and the school team members were "on the same page" and that the Parent was pleased with the Student's program.. (Testimony, P. Esposito; B-35; B-50, P.4; FOF16)

25. The position of the Parent in the October 5, 2005 PPT was in sharp contrast to her position at the PPT held only a week later, on October 12, 2005. During this week it appears that the Parent came to be under the misimpression that the Student had to be identified as an emotionally disturbed student in order for team to determine that his behavior was a manifestation of his disability. This belief persisted throughout the instant hearing and a good deal of time and evidence was spent on it. The attendees at this PPT were Mr. Esposito, the Mother, Tim Greene (math teacher), Adam Diskin, Marguerite Mitchell, and counsel for both parties. The purpose of the October 12, 2005 PPT was to conduct a manifestation determination, i.e., to determine whether the Student's September 29, 2005 misconduct was a manifestation of his disability. The PPT began by Mr. Esposito reviewing the misconduct of September 29, 2005 which was the subject of the manifestation determination. Mr. Esposito then discussed the PPT that had occurred the prior week, where the August 5, 2005 IEP had been reviewed. In addition, the Student's progress to date was reviewed again, although there had been no change in the Student's performance, since he had been out of school since the date of the last PPT because of the suspension. So, again, the teachers reported on their observations of the Student in their classes, reporting that the Student's behavior in school had been consistently positive and compliant. He had shown respect in class. He stayed on task with redirection. None of the teachers had reported any problems, nor had there been any disciplinary issues involving the Student and other than that of September 29, he had complied with all school rules. (B-36; B-37; B-50, p.4; FOF17-19).
26. The Parent's attorney asked the PPT to review the June 2005 evaluation. Mr. Diskin reviewed the evaluation. He stated that the results of that evaluation, specifically the BASC, reflected that the Student had not demonstrated any concerning behaviors in school, other than those related to his learning disability. The school team discussed that these test results were consistent with the Student's performance in school during the month of September at FHS. In response to the claim at this PPT by the Mother's attorney that the Student should have been found eligible for special education due to serious emotional disturbance ("SED"), the PPT reviewed the Worksheet to Determine Eligibility for SED. Specifically, the team reviewed each of the possible five criteria for determining eligibility, and unanimously agreed that the Student met none of those criteria. The Mother, though her counsel, disagreed. (Testimony, P. Esposito; B-30, p.5; B-37; FOF19-20).
27. The PPT then reviewed and responded to the questions under the provisions of the Individuals with Disabilities Education Improvement Act regarding

manifestation determinations. The first question was whether the Student's learning disability caused or had a direct and substantial relationship with the Student's possession of fireworks and a weapon on school grounds. Based on all of the information before them, the school based team determined that there was no causation or direct and substantial relationship between the Student's learning disability and his misconduct. The Mother disagreed. (Testimony, P. Esposito; B-37).

28. The PPT again reviewed the Student's IEP. The IEP that was developed at the August 5, 2005 PPT (B-30) was the IEP in effect as of the beginning of the 2005-2006 school year. Pursuant to that IEP, the Student was to receive 10.5 hours per week of special education services; of these, 7 hours per week was special education direct instruction for English in a self contained classroom and 3.5 hours were delivered in the resource room. In addition, the team was implementing modifications in the mainstream classes. (B-30, p.4, 5). Mr. Diskin, the Student's resource room teacher, delivered 3.5 hours per week of special education services to the Student in the resource room. Approximately four students were in the resource room when the Student was there. Mr. Diskin had a positive relationship with the Student, who was always compliant and interacted appropriately with both the other students and with him. The Student liked being in the resource room. His disability was manifested in his reading and writing; in addition, he required refocusing and redirection because of his difficulties with focus and attention. He did not demonstrate impulsivity or hyperactivity in the resource room with small student to staff ratio. He was given strategies for organization. He was motivated to learn. Mr. Diskin addressed the Student's IEP goals and objectives in the resource room and the Student was making progress on them. (Testimony, A. Diskin; B-37; B-50, p.5; FOF19).
29. At no time during the PPT's review of the Student's IEP did the Mother or her counsel raise any issues regarding that August 5, 2005 IEP. Therefore, all team members, including the Mother, agreed that there had not been a failure to implement the IEP. (Testimony, P. Esposito; B-37). The Mother's attorney made a statement which he asked be recorded in the minutes of the PPT. The minutes reflect that statement: "[The Student's] behavior was a manifestation of his disability based on a significant learning disability. They rely heavily on the June 30, 2005 evaluation. Based on his significant disability, [the Student's] disability impairs his ability to understand the impact and consequences of his behavior. He is also disabled based on an emotional disturbance. This is demonstrated by statements by the mother and [the Student], including his feelings of inadequacy, being teased, being sad and nervous, because of his learning disability. The PPT has enough evidence to indicated that [the Student] has a general pervasive mood of unhappiness or depression, including the development of fears and symptoms associated with school problems. Based on the June 30, 2005 evaluation and the clinically significant ratings on the Self BASC III, the school could and should have conducted additional assessments or evaluations of [the Student] to address

the areas of sense of inadequacy, locus of control and his at risk ratings of anxiety, attention and self esteem." (B-37, p.3).

30. The October 12, 2005 PPT concluded that the Student's misconduct was not a manifestation of his learning disability. The Parent disagreed. (B-50, p.5, FOF 21; B-37; testimony, P. Esposito).
31. The Parent commenced a second due process hearing ("The Second Due Process Hearing"), which was presided over by the same hearing officer who had presided over the first. In the second hearing, the Parent claimed that the Board had failed to properly evaluate the Student, had failed to properly identify the Student as having a serious emotional disturbance, and had erroneously determined that the Student's September 29, 2006 misconduct was not a manifestation of his disability. (B-50).
32. Given the determination that the weapon which the Student brought to school was of such a type that the school had a right to make a 45 day alternative placement, a PPT was convened on November 2, 2005. At that time, the school based members of the PPT considered an appropriate interim alternative placement for the Student and recommended Project Learn. In addition, as an accommodation to the Mother and because of her contention that the Student had a serious emotional disturbance, the district offered a psychiatric evaluation of the Student, at Board expense. The Mother refused both of these offers. (B-41, B-42; testimony, P. Esposito).
33. The Mother did not enroll the Student at Project Learn, and kept the Student home. (Testimony, Parent). The Student received no educational program from this point (October 20, 2006) to the first day of the instant hearing when the instant Hearing Officer became aware of the situation and ordered home tutoring, as order that the Board readily and the Parent reluctantly complied with through at least the hearing and post hearing brief period..
34. On November 28, 2005, the parties engaged in mediation. The mediation ultimately failed. (B-50, p.2).
35. The Board received notice from the Groton Town Police Department in October of 2005 that the Student had been arrested on October 20, 2005 for Manufacture of Bombs and Breach of Peace Second Degree ("the Manufacture of a Bomb"). Mr. Esposito waited to take any action on this behavior until December 5, 2005 because prior to that date, the parties had been negotiating a resolution of the matter and because of his concern for the Student, he did not want to impose the suspension if the matter was settled. When the settlement discussions fell apart, he contacted the Parent by email to set up a meeting with the Student to discuss the incident. The Parent refused to allow any communications regarding the issue. Also on December 5, 2005, Dr. Jacaruso sent a letter to the Parent regarding the scheduling of a PPT to address issues raised by the Parent as well as to conduct a manifestation PPT regarding the bomb making incident. (Testimony, P. Esposito; B-40; P-11; pp. 1-2; B-44).
36. On December 12, 2005, Mr. Esposito sent a notice to the Parent that the Student was suspended for ten days for the Manufacture of a Bomb. Because the Student had been placed on a 45 school day interim alternative placement

as of November 2, 2005, this 10 day suspension was to take effect upon the Student's return to school from that 45 day placement. Based on this, the suspension began on January 30, 2006 (B-63; testimony, P. Esposito).

37. On December 22, 2006, an invitation was sent for a PPT to be held on January 5, 2006. The purpose of this PPT was a Parent request, as well as a manifestation determination. (B-45).
38. The PPT was convened on January 5, 2006. In attendance were the Parent, the Parent's father, Mr. Esposito, Gail Green (regular education teacher), Adam Diskin, Marguerite Mitchell, Dr. Jacaruso, and Board counsel. As of the date of this PPT, the Student had not been in school, or in any educational setting, since October 20, 2006. The PPT began by the statement of the manifestation determination standard: Whether the Student's learning disability caused or had a direct and substantial relationship to the misconduct and whether the Board's failure to implement the IEP caused the misconduct. The misconduct being reviewed was the Student's making of a bomb and breach of peace off campus on October 20, 2006. The team reviewed the Student's disability, which was a "learning disability in the areas of writing and reading and issues of ADD regarding attention and focus". The team again reviewed the Student's educational history and performance, reporting that the Student had historic reading difficulties, problems with completing work on time, did not demonstrate any behavioral issues in class, used resource room appropriately, had weak organizational skills that were being addressed, had good relationships with teachers and students, was easily brought back on track with refocusing if off track, had not been referred by teachers, and had not had any administrative discipline prior to the September 29 incident which was also discussed. Based upon this discussion, the school based team concluded that there was no direct or substantial link between the Student's disability and the misconduct. The Parent disagreed, stating that the Student's fourth grade reading level related to the Parent's not being able to teach the Student not to make a bomb, and that he has the mind of a fourth grader. She also claimed that he had been diagnosed with intermittent explosive disorder and depressive disorder. The staff had not seen evidence of these disorders in school nor had they been provided with any documentation supporting this claim. (B-56, pp. 2-3; testimony, P. Esposito; testimony, A. Diskin).
39. The PPT also reviewed the question of whether the failure to implement the IEP caused the misconduct. The team reviewed the August 5, 2005 IEP, determined that it was being implemented when the Student was at FHS, and concluded that there was no failure to implement the IEP and therefore, the failure to implement the IEP did not cause the misconduct. The Parent disagreed, stating that a behavioral plan should have been implemented. (B-56; testimony, P. Esposito; testimony, Parent). On January 27, 2006, a PPT was held for the purpose of reviewing an evaluation apparently required by the court that the Parent had requested be provided to the Board. There was discussion at the hearing about the production of this evaluation. On the first day of the hearing, Board's counsel explained that the document had been sent

to the Board by the probation officer, with the instruction that it not be disclosed to any third party. The Parent reported to the January 27, 2006 PPT that a copy of the report had been previously reviewed with her, but she had been prohibited from receiving a copy of the report. On the last day of the hearing, the Mother represented that she recently had been in court and had been told that she could not have a copy of the evaluation. The Board, in view of same, was concerned about providing a copy of the report to the Parent, and the Hearing Officer on the first day of the hearing called the probation officer to obtain some clarification, but her phone call was not returned. Furthermore, the Parent notified the Board that it was not permitted to contact the Student's probation officer or the juvenile court. (P-11, p.29). The Hearing Officer was never provided a copy of the report; it did not come into evidence.

40. At that PPT, Ms. Schmenk reviewed the evaluation, and explained that it provided a clinical evaluation of the Student. A BASC had been performed but the Parent had not reported him as being depressed. The Parent reported that the Student had commenced therapy but when requested, would not disclose to the school the name of the therapist. Ms. Schmenk further explained that the evaluation referenced various factors impacting his clinical picture, including the Student wanting to live with his father and wanting to see a girl in school that his mother did not want him to see. She also explained that the report did not diagnose the Student as having an intermittent explosive disorder, but rather as something that needed to be ruled out. The school team stated that they had not seen explosive behavior demonstrated by the Student. His regular education teacher reported that the Student at times needed refocusing, but refocused with cues. Ms. Lunt, the Student's special education teacher for reading, stated that the Student was successful in her class, was always polite, related to peers, and was happy and friendly. She used him as a "helper" to deliver messages and found him to be reliable. Based on the information provided by the evaluation, the team re-reviewed the SED checklist for the Student and again determined that the Student did not qualify as a student with a serious emotional disturbance. Regardless, Dr. Jacaruso stated that the Board could offer and provide counseling to the Student as part of his program. The Parent responded that she did not want any changes in his IEP, that FHS was not an appropriate program for him, and that she did not want any counseling provided to him. (B-48; testimony, Parent; testimony, J. Schmenk).
41. An expulsion hearing was held on January 27, 2006 before an independent hearing officer appointed by the Board. In attendance at that hearing were Dr. James Mitchell (the Board's Superintendent), Mr. Esposito, two police officers, the Student, the Parent, the Parent's husband, and Board counsel. In what can only be fairly described as a major error in judgment the Parent called the Student, then just turned fifteen years old and with criminal charges pending, to testify at his expulsion hearing without the benefit of counsel and describe his participation in the making of the Molotov cocktail. The expulsion hearing officer permitted this. The Parent testified, and the Board

did not rebut, that the hearing officer in the expulsion matter was a principal from another school outside of the district. The Student testified that he was "hanging out" with about ten or eleven other kids on the corner of his street when one of the other kids asked him if he wanted to aid him in throwing a Molotov cocktail in the road. Initially, the Student said no, but when approached a second time and asked to "just give him some gas" agreed to let the other student take some gas from the Student's garage. The Student watched the other student light the device and throw it onto Route 1 when no cars were there. The Student did not light the device and did not throw it. The Student told the other student not to throw it when anyone was around so that no one would get hurt. The other student threw it about six feet from where the two were standing, it flashed for one second, died down and the Student ran. The Student knew that a Molotov cocktail was a type of explosive device but he did not know how to make one and did not make this one. When cross examined by the Board as to why he gave the other student the gas, the Student testified "He asked me for it." The Student knew that somebody could get hurt, and that the Student himself had violated the law and could get arrested for this. He did not read the school rules because he cannot read well enough to read them. Some of the school rules had been reviewed with him orally by staff but he could not remember he had been told that a student could get in trouble for things done off school grounds, but whether anyone told him or not, he did not know it. His testimony from the expulsion hearing appeared to be genuine and credible. (B-57; testimony, P. Esposito).

42. The expulsion hearing officer expelled the Student for one calendar year commencing on December 12, 2005 ("the Expulsion"). (B-52).
43. Hearings were held in the Second Due Process Hearing before the other hearing officer on December 7, 12 and 21, all of which time the Student was receiving no educational program. On January 31, 2006, the other hearing officer issued a decision in the Second Due Process Hearing finding that the Board properly evaluated the Student on June 30, 2005; that the "Student is not properly identified as a child with a serious emotional disturbance", and that the "Student's misconduct on September 29, 2005 was not a manifestation of his learning disability and/or SED".
44. Following the expulsion, the PPT reconvened on February 5, 2006 for the purpose of determining the alternative educational placement during the period of expulsion. (B-53) That PPT was attended by the Parent, Mr. Esposito, Mr. Greene (the Student's math teacher), Mr. Diskin, Ms. Mitchell, the Board's attorney, and Karen Kemp, a social worker who served as an advocate for the Parent. The team again reviewed the August 5, 2005 IEP. Ms. Kemp had various questions about the history of the PPT's and the Student's IEP and time was spent responding to these questions and explaining the status. The Parent asked about a behavior plan for the Student and the team asked the Parent to give some information as to the type of behaviors she wanted addressed in a behavior plan and the team would attempt to respond. The Parent's advocate stated that she was coordinating

the mental health services for the Student and his family, and that there was no need for any counseling in school. The Parent stated that she did not want any behavioral interventions in school for the Student. (B-54; testimony, P. Esposito; testimony, Mother).

45. The school team offered to include counseling in the Student's IEP and explained how the services could be delivered. The Parent rejected this offer. (B-54; testimony, P. Esposito, testimony, Mother).
46. The school team recommended Project Learn as the alternative educational placement during the period of expulsion and provided contact information to the Parent. Ms. Mitchell explained how FHS coordinated with Project Learn to insure that students earned credits while at Project Learn. Mother rejected Project Learn, stating that she had observed holes in the walls and only two students present when she observed there. (B-54; testimony, Parent).
47. The Parent's advocate asked whether the Board would make a placement at Waterford County Day if a spot opened up for the Student. Mr. Esposito explained that the placement during the period of expulsion was a PPT decision and if the Parent requested a further PPT, the PPT would reconvene. (B-54; testimony, P. Esposito; testimony, Parent).
48. On February 16, 2006, the Parent had a neuropsychological assessment conducted of the Student at Memorial Hospital of Rhode Island ("the Brown Evaluation"). She provided it to the Board and the Board convened a PPT on March 29, 2006 for the purpose of reviewing the evaluation. Present at that PPT were the Parent, Joyce Schmenk (who had previously evaluated the Student in June); Paul Esposito; Gail Green; Adam Diskin; Allysa Hug (school psychologist at FHS); Marguerite Mitchell; Dr. Jacaruso, Abby Dolliver (Director of Learn) and the Board's attorney. (B-59; testimony J. Schmenk; testimony, Parent).
49. All members of the PPT had copies of the Brown Evaluation which was reviewed at the PPT. Ms. Hug was concerned that the WISC-IV had been re-administered within seven months of its June 2005 administration by Ms. Schmenk, which was contrary to the requirements of the test manual. Ms. Hug and Ms. Schmenk together reviewed each and every subtest of the Brown Evaluation and it was discussed by the PPT. The only test administered by the Brown Evaluation regarding reading was the Gray Oral Reading Test, a test which reflects the student's fluency and comprehension when reading out loud. On that test, the Student scored at the second grade level in rate, accuracy and fluency, but at the sixth grade level in comprehension. The school members of the PPT had questions regarding the administration of the assessments and asked for permission to speak with the evaluators, but the Parent refused to allow such communications. The Connors Rating Scale was administered and reflected no areas of concern. In summary, the school team members were of the opinion that the Brown Evaluation was consistent with the June 2005 evaluation administered by Ms. Schmenk and provided no real new information regarding the Student's disability and educational needs. (B-9; testimony, J. Schmenk).

50. Having reviewed the Brown Evaluation, the PPT then reviewed the August 5, 2005 IEP. Mr. Diskin reviewed each goal and objective from that IEP and discussed how it had been implemented at FHS while the Student attended. The team then reviewed the recommendations of the Brown Evaluation. The team discussed that most of the recommendations were for particular strategies, instructional materials or curriculum. Many of the suggested strategies had been used and would have been used at FHS for the Student had he continued in the program there. The team also explained that an IEP does not set forth specific strategies and curriculum because it is important that teachers have flexibility to use their own judgment in working with a student as to what particular interventions are or are not successful. (B-59; testimony, P. Esposito; testimony, Mother).
51. The Parent stated that she was requesting of the team that the Student be provided with the Wilson program. The team discussed the Wilson program and agreed that the Wilson program was not appropriate for the Student. Ms. Schmenk stated that the Student's relative strengths were in the pseudo work subtest, that she did not believe that he had experienced much success when he was provided with the Wilson program in the elementary school and school team members were concerned that he would be bored. Dr. Jacaruso explained the importance of addressing the Student's reading needs through a variety of strategies, not just one particular reading program, including many of the strategies recommended by the Brown Evaluation. The team agreed that using books on tape, coupled with text, would be important. The school team discussed other modifications recommended that would be helpful for the Student including graphic organizers, study guides, and having him restate in his own words ("3-way communication" as described by the Parent). The Student's August 5, 2005 IEP was revised to include these modifications. The team also discussed using sight words to assist with learning; Dr. Jacaruso explained that the sight words would come from the instructional materials. The Mother stated that she only wanted the sight words from the Wilson reading program. (B-59; testimony, P. Esposito; testimony, J. Schmenk; testimony, Mother).
52. Ms. Schmenk recommended revising the August 5, 2005 IEP with respect to reading comprehension. The August 5, 2005 IEP contained a comprehension objective (see B-30, p.8; objective 2) but Ms. Schmenk recommended that this objective be made into a single goal, with two objectives, one for answering oral comprehension questions and one for written comprehension questions. (B-59; p.5). When asked if she was in agreement with the new goal, the Parent's response to the team was "go knock yourself out". The Parent said that the goals and objectives should reflect all of the materials being used, and that they should be as specific as the Parent wants. The school team disagreed, but Mr. Esposito offered to provide copies of the materials used in implementing this goal upon request of the Parent. Mr. Esposito asked the Parent if she had any other questions or changes she wanted made to the IEP. The Parent refused to respond. (B-59; testimony, P. Esposito).

53. The school team agreed to the changes to the IEP, i.e., the new goal with two objectives, and the additional modifications. (B-59, pp. 5-6). Mr. Esposito asked Ms. Dolliver if Project Learn could implement the IEP as revised. The Parent stated she was leaving the meeting. She was encouraged to stay and it was explained to her that the meeting would continue even if she left. She left the meeting. (B-59; testimony, Mother; testimony, P. Esposito).
54. The PPT continued and Ms. Dolliver explained that the IEP could be implemented at Project Learn. At the time of the PPT, there were five students, with two certified special education teachers, one of whom is also certified in English. One of the five students has a learning profile very similar to that of the Student. She described the various strategies used at Project Learn and in fact recommended that the Co-Writer software be used for the Student. That modification was included in the IEP. (B-59, p.6). She discussed reading instruction and the importance of making it meaningful to students at this age level. She described the point system used at Project Learn as a built in behavior system which would automatically be part of the Student's program. She explained that the program does not use a time out room. The Student's transition goal could be worked on in the community. The team concluded that Project Learn was an appropriate alternative educational opportunity for the Student during his period of expulsion. (B-59; testimony, P. Esposito; testimony, A. Dolliver).
55. The Student attended 28 days of school at FHS. He was suspended for ten days commencing on September 29, 2005. He was scheduled to return from that suspension on October 14, 2005, but the Mother kept him home from school without any excuse and therefore he was deemed to be unexcused on October 14 and 17, 2006. He returned to school for three days. On October 20, 2005, Mr. Esposito spoke with the Parent who said that because of the stress in the family, and the fact that the bomb-making incident had become a police matter, she needed to send the Student to be with his father in Massachusetts for "a few days". Mr. Esposito offered to consider the Student's absences as excused, and the attendance record reflects that the Student was absent, but excused from October 21, 2005 through November 9, 2005. However, on November 2, 2005, the PPT recommended the 45 day placement at Project Learn as described above. The Parent was provided five days for the implementation of this action. When the Student failed to attend Project Learn after that five day period, his continued absences were considered unexcused, and continued to be unexcused through his January 30, 2006 suspension. The Parent chose to not permit the Student to attend Project Learn, nor did the Parent home school the child in accordance with state law and Board policy, nor provide the Student with any other educational placement. The Board filed a truancy report after the Student's continued unexcused absences and the matter was referred to Juvenile Court. (B-62; testimony, P. Esposito; testimony, Mother).
56. During the time that the Student attended FHS, his August 5, 2005 IEP was implemented at all times. He received a total of 10.5 hours of special education services. Of this time, 7 hours were delivered in a special

educational English class, which addressed reading and writing. The class was taught be a certified special education teacher (Sue Lunt) and contained approximately 8 -10 students at below grade level reading levels. The reading instruction was not individualized enough. The average reading level of the students in that class was at the fourth grade reading level. The class is for students who have needs in the area of basic reading skills; it is a self contained class for students who have not mastered the basics of reading. Goal 1 of the Student's August 5, 2005 IEP was worked on in that classroom. In addition, the Student received 3.5 hours per week in the resource room, with instruction from Mr. Diskin, another certified special education teacher. In the Student's resource room were approximately four other special education students with learning disabilities or labeled as other health impaired, and with a range of reading levels. In the resource room, Mr. Diskin worked on reading comprehension, organizational and study skills. All teachers reported that at all times the Student had made a good transition to the high school, was happy, had good relationships with peers and adults, was polite, compliant and cooperative. At no time did he evidence any impulsivity; rather, his attention deficit manifest itself in inattention and lack of focus, although the Student could be redirected with a verbal cue. He showed no resistance to those cues to focus. Although he was only in school for a relatively short time, he was making progress on his IEP goals and objectives during that time. Had he continued at FHS, he would have moved into a higher math class at the beginning of the second semester, and also would have had an additional academic lab which would have provided him with additional instruction for reading and writing in a small class environment. (Testimony, A. Diskin; testimony, P. Esposito).

57. Dr. Anjali Palav is a clinical neuropsychologist who conducted the Brown Evaluation. Dr. Palav has conducted between 500 and 600 evaluations of which approximately one third involved high school students. She has administered the Gray Oral Reading Test approximately 200 to 300 times. She is not an educator but she has reviewed research on reading methodologies that are effective with students who have difficulties reading. She testified that the Wilson reading program is not the only appropriate reading program for the Student but it is one of the appropriate programs, and it is age appropriate. She testified about the Brown Evaluation which was administered to the Student in the six hour stretch, with breaks, that is consistent with the standard Brown Evaluation practice. As part of the evaluation, she spoke with the Parent and with the Student, had the tests administered by a clinical neuropsychology intern, reviewed the test results, reviewed records and reviewed and revised as necessary the report which was initially authored by the intern. She testified that her test results were consistent with the test results obtained by Joyce Schmenk in June of 2005 with a full scale IQ of 89 compared to a full scale IQ of 87 in June, 2005. She explained the re-administration of the WISC-IV, despite being within the prohibited test-retest interval, as being based on the fact that the Parent reported that the Student had had a head injury in the summer of 2005 and the

clinical decision that retesting could demonstrate whether that injury had any effect on cognitive functioning; it did not. At no time did the Parent report at any PPT that the Student had had this head injury and the first time that the Board learned of it was when the Brown Evaluation was received. (Testimony, Dr. Palav).

58. She administered the Gray Oral Reading Test to the Student, who was 15 years old and in ninth grade at the time and he scored at the second grade level. (Testimony, Dr. Palav).
59. The Brown Evaluation concluded that the Student had high average perceptual reasoning abilities, at least average problem solving skills, significantly below average ability to read quickly and accurately, and comprehension skills which were in the low average range. (Testimony, Dr. Palav)
60. Dr. Palav diagnosed the Student with the following:

    1. Dyslexia
    2. Attention Deficit/ Hyperactivity Disorder – Combined Type
    3. Unspecified Condition of the Brain (memory impairment)
    4. Depressive Disorder – Not otherwise specified
    5. Oppositional Defiant Disorder, by history
    6. Status post Mild Traumatic Brain Injury

    (Exh. P-9)

61. Abby Dolliver is the Director of special education for LEARN[2], a Regional Educational Service Center serving 24 towns in southeast Connecticut, including Groton. LEARN provides special education and related services through many programs including various site based programs. One of those programs is located in Oakdale, Connecticut. This is the program that was consistently offered by the Board's PPT's for the Student, beginning at the November 2, 2005 PPT and continuing through the March 29, 2006 PPT. The LEARN program averages approximately four students, but can be as high as six. The program is staffed by two certified special education teachers (one of whom is also certified in regular education), a school social worker and a behavioral interventionist. Of the four students attending as of the date of Ms. Dolliver's testimony, there was one 8th grader and three tenth graders. In general, the reading level of the students at LEARN is from third to fifth grades. Students receive individualized instruction for their academics in small groups and on a one-to-one basis. They receive physical education in Montville's alternative high school 45 minutes per week, where they also access the school library for approximately 1.5 hours per week. A built in behavior system is in place for behaviors such as work completion and compliance. Students receive approximately four hours per day in individualized academic instruction; there are also social skills groups conducted by the social worker and current events reviewed daily. There are

[2] Project Learn and Learn have been used interchangeably throughout the PPTs, although Ms. Dolliver explained that Project Learn is the historic name and the correct name at this point is actually LEARN.

approximately two to three computers on site for use by the students. LEARN has a technology department which is available to LEARN and can provide educational software and computers as necessary if required by an IEP (or presumably if ordered). There is daily communication with parents. The staff does not have specific training in reading or in tracking weekly progress in fluency. LEARN is willing, if required by an IEP (or presumably if ordered) to provide staff with training in reading including tracking weekly progress in fluency, and including specific methodologies such as the Wilson program. While LEARN has provided Wilson instruction to some students, it has been for younger students and Ms. Dolliver did not believe that Wilson was appropriate for the Student although she did not seem very familiar with the methodology and is a social worker and administrator by education and training; She is not a teacher or psychologist. (Testimony, A. Dolliver).

62. Much time was devoted during the hearing describing the physical setting of LEARN. LEARN is located in a storefront and has been located there for four years. Next to LEARN is a Chinese restaurant, then there is a space and another building is next to that space. Mugsy's Café is located in that other building and Mugsy's appears to be a bar. At no time has there ever been any problems or issues with Mugsy's Café or with any customers. There have never been any incidents. There is a room at LEARN that had previously been used as a time out room when the program was for younger children, but is not used for the current program, although if a student wants a place to go for some quiet time, that room is available. Last year, the State Department of Education did a program review of LEARN and approved it. (Testimony, A. Dolliver, testimony of Parent).
63. Ms. Dolliver spoke with the Parent twice, the first in approximately November. The Parent said that she was not interested in the LEARN program, but after Ms. Dolliver explained the program to her, Ms. Dolliver believed that the Parent was willing to consider it. LEARN staff reported to Ms. Dolliver that although appointments are to be scheduled for visits, the Parent appeared at LEARN in November and just walked in and out. She also made an unannounced visit in December. At no time did the Student observe the program. (Testimony, A. Dolliver).
64. An appropriate IEP for the Student can be implemented at LEARN. He could receive his individualized instruction there in a small group. Issues such as fluency could be worked on and addressed through various strategies including the Wilson program. Co-Writer software is already available at LEARN and if other types were necessary, LEARN could provide consultation as well as the necessary software and a dedicated computer. A built-in behavioral program would be provided to assist the Student with work completion and any other issues that would present themselves in the school environment. Although the Student did not manifest any signs of depression at FHS, any issues of depression that may now be manifested in the educational setting could be addressed through the on-site social worker. In addition, the Student's vocational goals could be addressed through vocational exploration. LEARN is an appropriate educational setting for the Student.

The Board has had success with the students that it has placed at LEARN. (Testimony, A. Dolliver; testimony, P. Esposito; testimony Y. Jacaruso).

65. The Parent feels the Wilson reading program can help her son learn to read because he had it in another school district out of state. The Parent has begun taking training to learn the Wilson program so she can use this method with him. In fact, she requested cancellation of one day of hearing as it conflicted with one day of the Wilson training she had signed up to take. That request was granted. Dr. Palav testified that Wilson is appropriate for older students and that there are other appropriate programs. The Board presented witnesses that testified that the Student would be bored with Wilson. None of the witnesses who testified for either side was certified in Wilson and none disputed that Wilson is an established, recognized reading program with a track history of success helping students advance their reading skills. (Testimony of Dr. Palav, Dr. Jacaruso, Parent)
66. The Parent did not tell Dr. Palav that the Board would have liked to talk to Dr. Palav and work collaboratively toward a resolution of this. The Board remains willing to do so. (Testimony of Dr. Palav, representation by Board counsel and various Board witnesses)

CONCLUSIONS OF LAW:

1. There is no dispute that the Student is entitled to special education and related services as a student identified with a learning disability and thereby entitled to receive a free and appropriate public education ("FAPE") pursuant to 20 U.S.C. §1400 et. seq., the Individuals with Disabilities Education Act ("IDEA", also "the Act"), 34 C.F.R Section 300.7(a) and Section 10-76a-1(d) of the Regulations of Connecticut State Agencies (RCSA).

2. The Act defines FAPE as special education and related services which:

   (A) have been provided at public expense, under public supervision and direction, and without charge;

   (B) meet the standards of the State educational agency;

   (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

   (D) are provided in conformity with the individualized education program required under Sec. 614(d)." 20 U.S.C. Section 1401(8).

3. The Board has the burden of persuasion in this matter. This is not altered in by *Schaffer v. Weast*, 546 U.S. ____, 126 S. Ct. 528 (U.S. 2005). *Schaffer* was addressing a situation from Maryland, a state whose statutory and regulatory scheme is silent on the allocation of burden of persuasion in special education cases. The Court recognized that, similarly, IDEA is silent on the allocation of the burden of

> persuasion. "Congress has never explicitly stated…which party should bear the burden of proof at IDEA hearings." *Id.* Under the circumstance where a state is silent on the allocation of the burden, the Court found that the burden of persuasion falls upon the party seeking the relief. However, the Court affirmatively elected not to decide the issue of the burden of persuasion when states have their own laws or regulations which assign the burden to the school district. "Because no such law or regulation exists in Maryland, we need not decide this issue today." Id. at III. Connecticut Regulations provide that "the public agency has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency." Conn. Reg. 10-76h-14. Therefore, the burden of proof remains on the Board.

4. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al. v. Rowley*, 458 U.S. 176 (1982), 102 S.Ct.3034 (*Rowley).* The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.

5. The Parent has not raised procedural concerns in her request for due process and did not present evidence on a failure of procedural safeguards so the first prong of *Rowley* is deemed satisfied.

6. Much of the hearing was spent on discussion, including some testimony, regarding whether the Student had a serious emotional disturbance (SED). Emotional disturbance is defined under the federal regulations as follows:

> The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
> (C) Inappropriate types of behavior or feelings under normal circumstances;
> (D) A general pervasive mood of unhappiness or depression;
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems;
>
> (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance. 34 C.F.R. 300.7(c)(4). If, after evaluation, a child is found to have an Emotional Disturbance, the team must also find that the child, by reason of this condition, requires special education. 34 C.F.R. 300.7(a)(1). Special education is defined as "specially designed instruction". 34 C.F.R. 300.26(a)(1). Even a

> student with learning difficulties is not eligible for special education services unless the difficulties are "so severe that he cannot benefit adequately from the regular education program". *Doe v. Board of Education*, 753 F.Supp. 65, 70 (D.Conn. 1990). Taking these requirements together, in order to find a student eligible for special education services as a child with SED or ED, the Planning and Placement Team (PPT) must find that the student exhibits one of five characteristics of emotional disturbance (1) over a long period of time (2) to a marked degree, such that it (3) adversely affects the student's educational performance, (4) causing the child to require specially designed instruction in order to receive a free appropriate public education.

7. Here, school staff uniformly reported that they saw the Student as personable, well-adjusted, and a student who conformed to classroom expectations, rather than as emotionally disturbed. The teachers at FMS who completed the BASC only reported significant behaviors that were related to the Student's learning problems, not any social emotional problems. This profile was consistent with the reports of the FHS teachers, all of whom reported the Student as being polite, respectful, compliant with school rules, socially appropriate, but having difficulties with reading, writing and attention and focus. In addition, the Parent herself on the Connors scale completed in February, 2006 reflected no behaviors of concern. (P-9).

8. In the Second Hearing Decision, Attorney Owens made a specific finding and order that the Student did not qualify as a student with a serious emotional disturbance. (P-50, P. 10, Final Decision and Order Paragraph 2). The only question then for the instant hearing is whether subsequent to November 2, 2005, the Student qualified as SED.

9. Two evaluations were completed after the November 2, 2005 date. One was ordered by the court, not provided to the Hearing Officer and not considered here. As of the PPT on January 27, 2006, the Student had been withheld by his Mother from attending LEARN, or from receiving any education, for three and a half months. The school team reviewed the court evaluation and apparently relied upon it. The team again reviewed the SED checklist and did not find qualification for eligibility. The evaluation provided clinical but not educational information and again, the school team continued to report that during the time that the Student was at FHS, he presented as a happy student, with good peer relations, no inability to learn, and not exhibiting inappropriate types of behaviors under normal circumstances. (B-48; testimony. J. Schmenk).

10. The other evaluation completed subsequent to the Second Hearing Decision was the Brown Evaluation. All assessments completed were related to the Student's educational performance. No projectives or social emotional tests were administered, although the Parent was provided with the Connors for the purpose of reviewing issues related to attention. No recommendations were made for any therapy or counseling or any types of behavioral interventions. The Parent reported no issues of concern to her in terms of the Student's attentional issues as measured by the Connors and "[r]esponse on a measure assessing symptoms of attention deficit hyperactivity disorder did not show

elevations consistent with either the inattentive or impulsive/hyperactive subtypes." (P-9, p.8).

11. In the instant case, the evidence does not support a finding that the Student qualifies as a student with a serious emotional disturbance before or after November 2, 2005. Based on the information available to the Board, which included its interactions and observations of the Student, the Board's evidence and testimony was consistent that neither at the middle school nor in his time at the high school was the Student demonstrating any behavioral issues of concern, let alone issues that would cause the PPT to find the Student to be SED.

12. Under the new provisions of the Individuals with Disabilities Education Improvement Act, the standards for a manifestation determination are narrowed and are as follows:

> "…[T]he local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
>
> (I) if the misconduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 42 U.S.C. §1415(k)(1)(E)(i).

13. In *Penn-Delco School District***,** 106 LRP 30209 (2006), the Pennsylvania State Educational Agency applied this new standard and cited to the above guidance when it overruled a hearing officer's decision that a student's conduct was a manifestation of his disability. In that case, school officials found a knife in the student's car which violated school policy and federal and state law. The student claimed that he forgot that it was there. At the manifestation hearing, the team considered whether the student's disability of auditory processing disorder, which often resulted in forgetfulness, impaired his self-control in this instance. The team concluded that the behavior was not a manifestation of his disability and a due process hearing ensued. The hearing officer concluded that the behavior of keeping a knife in his car and forgetting that it was there **was** a manifestation of the student's disability. The hearing officer based that determination on evidence presented by the parents, the student's caseworker, and the independent psychologist that the student's memory difficulties provided a nexus between the student's behavior and his disability. The hearing officer noted that the student was diagnosed with auditory processing and memory weaknesses which sometimes resulted in the student being disorganized. In overruling this finding, the panel noted that the testimony presented on behalf of the parents focused on whether the student had any malicious intent and whether his memory problems "played a role" in the behavior. The panel pointed out that "playing a role" is no longer enough to meet the new standard. The conduct must be "caused by" or have a "direct and substantial relationship to the disability" and that standard was not met in this case. In another decision, *Parkway C-2106, Missouri State Educational Agency*, LRP 26298, the hearing officer also relied on the language

cited above regarding the direct and substantial relationship when it upheld the district's determination that the student's behavior was not a manifestation of his disability. In this case, the student was classified at having an "emotional disturbance." Another student reported that the student had been smoking marijuana at the bus stop. When asked about the incident, the student was searched and finally confessed that he had done so and that more "stuff" was inside a seat on the school bus. During the manifestation determination hearing, the team considered evidence that the student had been generally well behaved. At a recent IEP meeting it was reported that the student's disability manifested itself in task avoidance, inconsistent task completion, taking notes, noncompliance, and peer and adult interactions. The hearing officer pointed out, however, that the "consistent testimony of school district witnesses showed that these concerns were mild and in some settings virtually nonexistent." p.2. The team concluded that the behavior was not caused by and did not have a direct and substantial relationship to the student's disability. In affirming this decision, the hearing officer pointed out that the parents bear the burden of proof in proving the claim. The hearing cites both *Schaffer v. Weast*, 126 S.Ct. 528, 534 (2005) and United States Congressional Committee on Education and the Workforce which addressed this question directly. The Committee stated: "the obligation is on the parent to show that the child's action resulting in the discipline infraction was the direct result of the child's disability." In *Okemos Public Schools*, 45 IDELR 115, 106 LRP 14257 (2006), a student diagnosed with ADHD was found selling marijuana at school. Both the IEP team found and the due process hearing officer affirmed that the student's behavior was not a manifestation of his disability. The parents appealed claiming that the selling of the drugs was *caused by the student's impulsivity*, a symptom of his ADHD. In this carefully written opinion, the hearing officer outlined the reasons that parents failed to prove that the behavior in question was impulsive. First, there was evidence presented by some teachers that the student seemed "mature, thoughtful and reflective." Second, while the parents attended recent IEP meetings, they never expressed a concern at any of the meetings that their son acted impulsively. Third, the record of a neuropsychologist dated a month prior to the incident indicated that the student was responding very well to a new treatment and exhibiting fewer problems. Fourth, the evidence showed that the act of selling drugs at school actually occurred more than once, so the student had time to reflect on his actions, indicating that he was not acting impulsively. Also, this decision cites to a factually similar case, *Farrin v. Maine Sch. Administrative Dist. No. 59,* 165 F.Supp 2nd 37, 35 IDELR 189 (USDC ME 2001), to support the determination that the student's behavior of selling drugs was not impulsive. In that case, the court pointed out that the act of selling drugs involved planning and was not done on the "spur of the moment." The hearing officer noted that the same was true in the instant case. Even though *Farrin* was decided under the older more lenient manifestation standard, the court still did not find the child's behavior to be "impulsive" or a manifestation of his ADHD.

14. The manifestation determination in this matter was conducted at the January 5, 2005 PPT. The Student’s disability was properly reviewed as a learning disabled student. His disability was manifest as “a learning disability in areas of reading/writing and issues of ADD regarding and attention and focus”. The latter were addressed through verbal cues to refocus and with working with the Student on his organizational skills. The evidence presented did not establish that the Student was an impulsive student and the

misconduct in any event was not an act of impulsivity. The Brown Evaluation (obtained by the Mother) specifically concluded that the measurements they administered "did not show elevations consistent with either the inattentive or impulsive/hyperactive subtypes." (P-9, p.8). The manufacture of a bomb occurred over a period of time and involved the Student walking from the corner of his street to his garage, providing gasoline in the garage to the other student involved, watching that individual fill a bottle with the gasoline, walking to Route 1, knowing the other student was going to throw this into the road, acting as lookout to see if anyone was coming, watching the other student throw the Molotov cocktail into the street, watching it as it flashed and then running away so that he would not get caught. The Student, when he participated in the making of the bomb, knew it was wrong and hoped he would not be caught, although he was aware that he could be arrested for his conduct. The misconduct of participating in the bomb incident off school grounds did not have a direct and substantial relationship to the Student's learning disability.

15. The Parent has claimed that the manifestation determination was erroneous because the Board was not implementing the Student's August 5, 2005 IEP and therefore, the second prong of the manifestation determination test is not met. She concludes that based upon P-2 and P-3, which constitute the "marked" IEP of May 24, 2005, this was the IEP that was being implemented at FHS. However, as explained by Mr. Esposito, the marking of those supplanted IEP goals and objectives was a clerical error and does not change the fact that the August 5, 2005 IEP was at all times implemented while the Student was at FHS. The August 5, 2005 IEP was discussed and reviewed at each of the seven PPT's that were held for the Student during the 2005-2006 school year. The Parent was present at all of these, and at two of them she was represented by counsel or an advocate. She heard the school team discuss how the IEP was being implemented. She knew that it was being implemented, and in fact, this was an IEP which she described as "terrific". Mr. Diskin clearly testified that the August 5, 2005 IEP was the IEP in effect and being implemented for the Student during the entire time that he was at FHS. A question was raised as to the attendees at the January 5, 2006 PPT and why Ms. Schmenk, whose presence was needed by the team at a PPT later that school year was not in attendance at this PPT. 20 USC§1415(K)(e)(i) which provides that the "local educational agency, the parents and the relevant members of the IEP team (as determined by the parent and the local educational agency) are required to make the manifestation determination. Ms. Schmenk did attend two PPT's during the 2005-2006 school year to discuss outside evaluations, assist with their interpretation, and to compare and contrast those other evaluations with her own. However, the Student was not receiving any counseling services or services from the school psychologist, Student's disability which was the subject of the manifestation determination was his learning disability and the individuals most familiar with the presentation of that disability in the high school environment were in attendance. The June 2005 psychological evaluation was discussed by Mr. Diskin who had read it, was familiar with it and had previously reviewed it for the team at the first manifestation determination of November 2, 2005. The Student's performance in school was consistent with the testing profile reported by Ms. Schmenk. At no time did the Parent ever request that any additional participants be at the PPT, and she had adequate notice through the PPT invitation as to the attendees. It is therefore

concluded that the manifestation determination PPT of January 5, 2006 was properly constituted and the team had all the necessary information to conduct the manifestation determination.

16. There was no failure to implement the IEP which caused the misconduct.

17. Under IDEA 2004, the alternative setting for a student during the period of expulsion must provide the student with a FAPE and continue to offer the student the special education services that he or she is entitled to. 20 USC § 1415 (k) (1) (D) states:

> A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—
>
> (i) continue to receive educational services, as provided in section 612 (a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
>
> (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

19. In *A Letter to James*, Relationship Between Misconduct and Disability, dated July 28, 2005 OSEP wrote: "During long-term disciplinary removals, appropriate educational services may be provided to students with disabilities in some setting other than the student's prior assignment. The individualized education program team of the student subject to long-term disciplinary removal determines appropriate services and the location in which services will be provided." p. 2. In *Penn Delco School District***,** 106 LRP 30209 (2006), the hearing officer summarized the requirements of an interim alternative educational setting. The hearing officer stated that an alternative educational setting "shall be determined by the IEP Team." 20 U.S.C. § 1415(k)(2). The hearing officer also noted that during the period of expulsion, each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her learning needs. OSEP Memorandum 95-16 (April 26, 1995). The IDEA provides that a child with a disability who is removed to an alternative placement is entitled to FAPE including the provisions of special education services. 20 U.S.C. §§ (a)(1) and (k)(1)(D)(i).

20. A student has received FAPE when the school district follows the procedural safeguards required by IDEA and the IEP offers a program "reasonably calculated to provide some educational benefit to the student for whom it is designed". *Board of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). A state need not maximize the capabilities of the disabled child. Id. at 198. However, in this case, once the Board had the Brown Evaluation, if not before, they had the information that the Student's fluency rate was at the second grade level.

21. The Board has offered to the Student an appropriate interim alternative educational opportunity at LEARN. The Parent has chosen to keep the Student out of the program because she did not like the way the program looked. The Student was never given an opportunity to have any input into the decision, since he never visited the site or met with any of the LEARN staff or attended the March 29 PPT when he would have had the opportunity to meet and possibly speak with Ms. Dolliver. One would think that even if the Parent does not like a program, some programming is better than none, and instead she chose to keep the Student at home, isolated from peers and without any structured learning, with the result that the Student has in effect lost his freshman year and has not earned any credits towards graduation.[3] The reports of the homebound tutor reflect that the Student responded well to the individualized instruction and in fact, this is the type of individualized instruction he would have received at LEARN, albeit in a more structured educational environment, with other students, with access to technology and with a behavioral component built into the program. While the Board offered counseling and a behavior plan for the Student, both were ultimately rejected by the Parent and the Parent clearly took the position that counseling was a private matter for the Student and his family. Nonetheless, the LEARN program integrated behavioral interventions throughout the program which, again, was available to the Student at all times.

22. The August 5, 2005 IEP was an appropriate IEP for the Student except that it did not adequately address his fluency issues. The parent described it as "terrific" and praised Mr. Diskin. See also B-50, FOF8. When the Parent provided the Brown Evaluation to the Board, the IEP was reviewed and revised, tweaked and tightened up to be more specific regarding a reading comprehension goal and to include additional modifications, however the fluency deficit was not adequately addressed. The August 5, 2005 IEP, as modified on March 29, 2006 was appropriate except that it did not adequately address the Student's fluency deficit. By all accounts the Student is polite and cooperative in school. His intelligence is in the average range. Dr. Palav testified there is no reason why his reading cannot improve. The Board was aware, at least since the March 2006 PPT when they were presented with the Brown Evaluation, that the Student's fluency was at a second grade level. Why the Board did not discover this deficiency and address it earlier was not addressed or answered at hearing. In a peculiar twist, the Board seemed through part of its cross examination of Dr. Palav, and in its subsequent brief, to argue that fluency is not important because there is not much oral reading in high school. To the extent this is in fact an argument of the Board, the Hearing Officer disagrees. And while methodology decisions are often left to the teachers, here the teachers for reasons not explained did not adequately address this Student's fluency deficit. The Director of LEARN made it clear that LEARN can provide whatever reading program a Student needs. It could have been implemented at all times at LEARN, by certified special education teachers, with access to a school social worker and behavioral interventionist. The Student would have the opportunity to explore vocational interests

[3] At various times during the hearing, the Parent reported that she was home schooling the Student; however, she never completed any of the requisite forms or notified the district of the home schooling and at no time did she introduce any evidence as to what the home schooling consisted of.

through the LEARN program, while earning credits towards his high school diploma. The Board has proven that LEARN is appropriate, can implement the IEP, can address the Student's academic and any behavioral needs in a small environment, with intensive instruction individualized to meet the Student's needs. In addition, LEARN coordinates with FHS to match the regular education curriculum as appropriate and to insure the Student properly complies with FHS credit requirements for purposes of earning a high school diploma.

23. The Hearing Officer "shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education or the pupil if such pupil is an emancipated minor or eighteen years of age or older, has placed the child or pupil in a program other than that prescribed by the planning and placement team, or to prescribe alternate special educational programs for the child or pupil. Conn. Gen. Stats., Section 10-76h(d)(1).

24. In summary, the Student's involvement in the bomb making incident was not a manifestation of his disability; his placement at LEARN is appropriate; his IEP is appropriate except in regard to the Student's fluency deficiency.

COMMENTS ON PROCEEDINGS.

Pursuant to Connecticut General Statues Section 10-76h(d), the Hearing Officer is authorized to include in her decision comments regarding the conduct of the hearing. This is a case that calls out for such comments. *Pro se* parents are traditionally given significant leeway in presentation of their case.

Attorney Owens, in the Second Hearing Decision, found the Parent's behavior during that proceeding to be "erratic and uncooperative", "inappropriate and disrespectful", and evidenced by "outbursts", "impromptu exits from the hearing", "unpreparedness", "attempts to change the issues" and "untimely expressed intent to withdraw her case after resting her case". (B-50, p.10). One would expect that after such an admonition by a hearing officer appointed by the State Department of Education, the Parent would have taken a different tact in the instant hearing. That improvement did not occur and in fact the misconduct has appeared to have been emboldened by continued access to the process and participants. The protraction of this hearing, and the expenditure of resources directly attributable to the Parent, acting under the banner of protecting the rights of the Student, was completely unreasonable; when considered with the fact that the Mother kept him home from school, receiving no educational program, for months, it is unclear what the real agenda of the Mother is.

The following is a summary of the Parent's behavior and conduct during the hearing:

1. The Parent consistently wasted time during the hearings, required frequent breaks, requested repeated continuances and was not prepared to go forward with her case. The hearing was postponed on four occasions because the Parent was not prepared

to proceed, did not appear, or had other things to do, yet she complained that the decision would be delayed. All continuances requested by the Parent were granted. In the face of all of this, the Mother seemed oblivious to the fact that she was responsible for the delays.

2. The Parent consistently failed to provide a set of Parent's exhibits which complied with both the SDOE regulations and the directions of the hearing officer. Initially, the Parent submitted exhibits marked as Board exhibits as Parent exhibits. Then hours were spent walking through her exhibits page by page, numbering same, and explaining and re-explaining to her how her exhibits should be submitted. On every single day of the nine days of this hearing this was explained to her but at no time did she comply with the directions of the hearing officer, including the instruction of the Hearing Officer to provide an additional set of Parent exhibits for the witness. In fact at one point, when directed by the Hearing Officer to properly prepare the exhibits, she responded that she would not do so, in blatant defiance of the Hearing Officer. In fact, she never did submit a proper set of Parent exhibits to the Hearing Officer, to the Board or for the witness, even after all the work was done for her by the Hearing Officer's painstaking explanation to her of the process to be followed. Despite her pleas of ignorance regarding how to submit the exhibits, and her apparent inability to do so, the Board represented that this Parent was able to and did properly submit Parent's exhibits in the Second Due Process Hearing.

3. The Parent demonstrated emotional outbursts throughout the hearing. Many, many pauses and breaks were required for her to obtain some control over herself. She cried vocally and visibly at various times during the testimony of Board witnesses. She did not cry at any time when her own witness, Dr. Palav, testified.

4. Despite repeated requests by the Board and direction by the Hearing Officer, the Parent failed to specify her issues for the hearing until much of one day of hearing was spent going over her issues one at a time. Her request for relief changed as the hearing progressed, from a placement at Waterford County Day School to provision of Wilson Reading instruction. In addition, the Parent continued to interject irrelevant information and issues into the hearing. Thus, although the Parent's claim of sexual harassment was dismissed by the Hearing Officer on the first day of hearing, she submitted into evidence an email from her to the Board complaining about the same female student she claimed was harassing the Student at a time when the Student was not even attending the Board's school. (P-11). In addition, in an e-mail dated January 29, 2006, the Parent claimed for the first time that in middle school, the Student was "physically grabbed" by his math teacher and thrown against the lockers. When the Board offered to conduct an investigation about those charges, which were considered very serious charges if true, the Parent would not make the Student available to address the issue with the school administrators. Nonetheless, the Parent sought fit to submit this email stream into evidence. (P-11, pp. 11-14). Interestingly, this pattern of making an extraordinarily serious claim about events alleged to have occurred in school, and then not allowing the Board to investigate such claims is consistent with the Parent's treatment of the claim of sexual harassment and its discussion at the June 6, 2005 PPT; at that time,

the Parent removed the Student from FMS because of the claimed sexual harassment but when the Board offered to investigate the claim, the Parent dropped it. (B-27; testimony, Y. Jacaruso)

5. The Parent throughout the hearing, under oath, made numerous potentially serious allegations and when asked to present evidence substantiating the allegations, failed to do so. Nevertheless, the need to respond to such frivolous claims caused the further expenditure of time and effort. For instance, the Parent claimed that the first time she saw the minutes of the January 5, 2006 PPT was at the instant due process hearing more than three months later. The Board's position was that the minutes were sent out to her in the ordinary course of business following the PPT but that in any event they were hand delivered to her as part of the exhibits in the expulsion hearing on January 27, 2006. During this hearing, the Board's counsel handed the Parent a copy of the set of exhibits submitted at the expulsion hearing and the Parent claimed that the set she had did not include the PPT minutes, although the set handed to her did. The Hearing Officer asked the Parent to bring with her at the next day of hearing a copy of the exhibits from the expulsion hearing that were provided to her. She never produced those, but continued to allege that she had not been provided with a copy of these PPT minutes prior to the commencement of this hearing. Additionally, the Parent represented that the Student "had never been formally charged" with the manufacturing of the bomb, despite exhibit B-40. She also claimed that the charges had been "dropped". The Hearing Officer told the Parent that if that was the case, it would be helpful for the Parent to produce something in writing to this effect. The Parent never did so. Also, the Parent attempted to submit to the Hearing Officer issues regarding Grasso Tech and somewhat vague but potentially serious allegations that the Board had somehow been responsible for the Student's failure to be admitted to Grasso Tech. Given that all the evidence supports a conclusion that a technical education would likely provide the Student with a good foundation for a successful transition to his adult life, the Hearing Officer wanted to support this placement if it were possible. In compliance with the order of the Hearing Officer, Dr. Jacaruso contacted Grasso Tech, the FMS principal and even tracked down the Student's prior guidance counselor who had moved to Florida. The information requested by the Hearing Officer was submitted by the Board. The Parent, however, never provided any information and never followed through on the issue, again raising an issue, causing a flurry of discussion and activity about that issue, and then dropping it.

6. What the Parent called "distrust" of the Board permeated the proceedings and severely and repeatedly interfered with the hearing process. Although the Parent failed to properly produce her own exhibits, she refused to accept the Board's exhibits. When the Board's exhibits were finally admitted, she would not allow anything to be handed to a witness without her reviewing it, and this included Parent exhibits where the Board was using its own set, which it produced, since the Parent had failed to do so. She initially refused the Board's willingness to provide tutoring to the Student unless she could be present during the entire tutoring session. She appeared to be oblivious and unconcerned about the impact a mother's presence during tutoring would have on a 15 year old boy, had the Hearing Officer permitted it.

7. The Parent repeatedly failed to cooperate with the Board, all to the detriment of the Student. Ms. Schmenk asked the Parent to complete the parents' portion of the BASC. She refused to do so. The Board requested permission to speak with the evaluators who conducted the Brown Evaluation. The Parent refused. The Board offered to conduct a psychiatric evaluation in response to the Parent's claim that the Student was SED. The Parent refused. The Board inquired as to the Student's therapy as reported by the Parent. The Parent refused to provide any information and stated that the Student's counseling was private and none of the school's business. It is unreasonable for a parent to claim a student has a serious emotional disturbance and simultaneously maintain that the student's social emotional status is none of the Board's business.

8. Finally, the Parent's case, beginning with the request for due process, continuing through the pre-hearing conference and the days of hearing, and concluding with her brief, was presented in such a disorganized fashion that the proceedings were unnecessarily prolonged. Her issues, arguments and remedies were often changing.

V. CONCLUSION

1. The Student does not qualify for eligibility under the category of serious emotional disturbance.

2. The Student's off campus misconduct of October 20 was not a manifestation of his disability.

3. The Board has offered an appropriate program and placement for the Student with the exception of addressing his fluency issues. He is to remain at LEARN for the remainder of his expulsion but the Board is to provide an independent certified reading specialist to recommend a reading program for him which may or may not be WILSON, and to track his biweekly progress in reading, including fluency.